Petition

No. 81-679

Office - Supreme Court, U.S
FILED
OCT 9 1981
ALEXANDER L. STEVAS
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,
SILVERGATE DISTRICT LODGE 50, AN ASSOCIATION,
Petitioner,

v.

DAVID ANDERSON,
Respondent,

and

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OLINS, FOERSTER & SIEGEL
By: DOUGLAS F. OLINS
2718 Fifth Avenue
San Diego, California 92103
Telephone: (714) 297-7030

Counsel for Petitioner:
International Association
of Machinists and Aerospace
Workers, AFL-CIO, Silvergate District Lodge 50,
An Association

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

QUESTIONS PRESENTED

1. Whether a 1972 amendment to the Civil Rights Act of 1964 requiring private employers to reasonably accommodate their employees' religious observances or practices is in violation of the Establishment Clause of the First Amendment.

2. Whether the reasonable accommodation amendment to the Civil Rights Act repeals by implication a portion of the National Labor Relations Act, as amended.

3. Whether the duty of reasonable accommodation in the "dues" area requires a union and employer to violate their collective bargaining agreement in order to accord preferential treatment to religious objectors of union security clauses.

In addition to the parties listed in the caption, General Dynamics Convair Aerospace Division, A Corporation, was a defendant in the district court and an appellee in the Court of Appeals. The American Jewish Congress and the National Jewish Commission of Law and Public Affairs filed briefs amicus curiae in support of appellant in the Court of Appeals. The Equal Employment Advisory Council filed a brief amicus curiae in support of appellees in the Court of Appeals.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF CASE 3

REASONS FOR GRANTING THE WRIT 7

I. THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH THIS COURT'S HOLDING IN *TRANS WORLD AIRLINES, INC. V. HARDISON,* 432 U.S. 63 (1977) 7

A. The Court of Appeals Has Interpreted Title VII of the Civil Rights Act So As to Confuse The Concepts of "Discrimination" and "Reasonable Accommodation" and Thereby Cause Recurrent Problems in the Interpretation of the Civil Rights Act 9

B. The Court of Appeals Has Failed to Apply This Court's Principle, that in Evaluating Legislative History, Resort Should Be Made to the Statements of its Sponsors and No Amendment or Repeal of an Enactment May Be Made Without a Clear and Express Indication From Congress 10

TABLE OF CONTENTS (Continued)

Page

II. THE INTERPRETATION OF TITLE VII IN THE "DUES" AREA BY THE COURT OF APPEALS RESULTS IN IMPORTANT AND RECURRENT NATIONWIDE PROBLEMS IN THE ADMINISTRATION OF VALID UNION SECURITY CLAUSES IN COLLECTIVE BARGAINING AGREEMENTS 13

III. THE COURT BELOW HAS DECIDED THE CONSTITUTIONALITY OF A FEDERAL ENACTMENT IN A MANNER NOT IN ACCORDANCE WITH PRIOR APPLICABLE DECISIONS OF THIS COURT 15

- A. The Duty of Reasonable Accommodation Mandated By Section 701(j) Violates This Court's Tripartite Establishment Clause Test 17
  - 1. The Reasonable Accommodation Provision Lacks a "Clearly Secular Legislative Purpose" 17
  - 2. The Reasonable Accommodation Provision Has a Primary Effect That Advances Religion 20
  - 3. The Reasonable Accommodation Provision Excessively Entangles Government With Religion 23

IV. THE COURT BELOW HAS DECIDED AN IMPORTANT ISSUE OF FEDERAL LAW IN CONFLICT WITH A DECISION OF ANOTHER COURT OF APPEALS 26

TABLE OF CONTENTS (Continued)

Page

V. THE COURT BELOW HAS DECIDED AN IMPORTANT ISSUE OF FEDERAL LAW IN CONFLICT WITH A DECISION OF A FEDERAL DISTRICT COURT 27

VI. THE CREATION OF A DE NOVO REVIEW BY THE COURT OF APPEALS IN VIOLATION OF RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THE ERRONEOUS NATURE OF THE DECISION BELOW REQUIRE THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION TO AVOID RECURRENT PROBLEMS 28

CONCLUSION 31

TABLE OF AUTHORITIES

Page

CASES

Abington School District v. Schempp, 374 U.S. 203 (1963) 19

Anderson v. General Dynamics Convair Aerospace Division, 431 F.Supp. 418 (S.D. Cal. 1977); 589 F.2d 397 (9th Cir. 1978), *rehearing and rehearing en banc*, denied January 16, 1979; *cert. denied*, 442 U.S. 921 (1979); 489 F.Supp. 782 (S.D. Cal. 1980); 648 F.2d 1247 (9th Cir. 1981) .... Passim

Board of Education v. Allen, 392 U.S. 236 (1968) 21

Buckley v. American Fed. of Television & Radio Artists, 496 F.2d 305 (2nd Cir. 1974), *cert. denied*, 419 U.S. 1093 (1974) 23

Burns v. Southern Pacific Transportation Co., 589 F.2d 403 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) 29,31

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) .... Passim

Cooper v. General Dynamics Convair Aerospace Div., 533 F.2d 163 (5th Cir. 1976) 12,29

Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975); affirmed by an equally divided court; 429 U.S. 65 (1976); vacated for further consideration, 433 U.S. 903 (1977) 13,16,25,29

Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970); affirmed by an equally divided court, 402 U.S. 689 (1971) 9,11,29

Draper v. U.S. Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1975) 29

TABLE OF AUTHORITIES (Continued)

Page

CASES (Continued)

Engel v. Vitale, 370 U.S. 421 (1962) 19

Everson v. Board of Education, 330 U.S. 1 (1947) 15,21

Fournco Glass v. Transmirra Products Corp.,
353 U.S. 222 (1957) 10

Fullilove v. Klutznick, 448 U.S. 448 (1980) 20

Gavin v. People's Natural Gas Co., 464 F.Supp. 622
(W.D. Pa. 1979), *vacated and remanded* on other
grounds, 613 F.2d 482 (3d Cir. 1980) 24,31

Gillette v. United States, 401 U.S. 437 (1971) 19,22,25

Hicks v. Miranda, 422 U.S. 332 (1975) 27

Hunt v. McNair, 413 U.s. 734 (1973) 17

Isaac v. Butler's Shoe Corporation,
25 E.P.D. Para. 31,757 (N.D. Ga. 1980) 27,28

Lemon v. Kurtzman, 403 U.S. 602 (1971) 17,23

Lutcher v. Musicians Union, Local 47,
633 F.2d 880 (9th Cir. 1980) 9

Mandel v. Bradley, 432 U.S. 173 (1977) 27

Meek v. Pittenger, 421 U.S. 349 (1975) 17

Morton v. Mancari, 417 U.S. 535 (1974) 11

Muniz v. Hoffman, 422 U.S. 454 (1975) 10

Murray v. Schooner Charming Betsy,
6 U.S. 64 (2 Cranch 1804) 31

TABLE OF AUTHORITIES (Continued)

Page

CASES(Continued)

National Woodwork Manufacturers Association v. NLRB,
386 U.S. 612 (1967) 11

NLRB v. Catholic Bishop of Chicago,
440 U.S. 490 (1979) 23,24,25

NLRB v. Fruit & Vegetable Packers, 377 U.S. 58 (1964) 19

N.L.R.B. v. General Motors Corp., 373 U.S. 734 (1963) . 14

Nottelson v. A.O. Smith Corp.,
643 F.2d 445 (7th Cir. 1981) 26,27,31

Radio Officers' Union v. N.L.R.B., 347 U.S. 17 (1954) .. 14

Rankins v. Commission on Professional Competence,
24 Cal.3d 167, 593 P.2d 852 (1979), appeal dismissed,
444 U.S. 986 (1979) 27

Reid v. Memphis Pulbishing Co.,
468 F.2d 346 (6th Cir. 1972) 29

Riley v. Bendix Corp., 330 F.Supp. 583 (M.D. Fla. 1971),
464 F.2d 1113 (5th Cir. 1972) 11,29

Rohr v. Western Electric Company, Inc.,
567 F.2d 829 (8th Cir. 1977) 13

Schwegann Bros. v. Calvert Distillers Corp.,
341 U.S. 384 (1951) 19

Sloan v. Lemon, 413 U.S. 825 (1973).................. 17

Stone v. Graham, 449 U.S. 39 (1980).................. 19

Thomas v. Review Board of Indiana,
___ U.S. ___, 101 S.Ct. 1425 (1981) 23

Tilton v. Richardson, 403 U.S. 672 (1971) 17

TABLE OF AUTHORITES (Continued)

Page

CASES (Continued)

Tooley v. Martin-Marietta Corp., 648 F.2d 1239 (9th Cir. 1981) .... Passim

Torcaso v. Watkins, 367 U.S. 488 (1961)................ 12,19

Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), reversing 527 F.2d 33 (8th Cir. 1975) .... Passim

United States v. Ryder, 110 U.S. 729 (1884) 10

United States v. Seeger, 380 U.S. 163 (1965) 23

United States v. Yellow Cab Co., 338 U.S. 338 (1949) .. 28

Walz v. Tax Commissioner, 397 U.S. 664 (1970)........ 21

Welsh v. United States, 398 U.S. 333 (1970) 23

Wirtz v. Local 153, Glass Blowers, 389 U.S. 463 (1968) . 11

Wisconsin v. Yoder, 406 U.S. 205 (1972)............... 22

Wolman v. Walter, 433 U.S. 229 (1977) 17

Yott v. North American Rockwell Corp., 501 F.2d 398 (9th Cir. 1974); 428 F.Supp. 763 (C.D. Cal. 1977), *affirmed on other grounds*, 602 F.2d 904 (9th Cir. 1979)................................ 8,11,14, 22,29

Young v. Southwestern Savings & Loan, 509 F.2d 140 (5th Cir. 1975) 29

TABLE OF AUTHORITIES (Continued)

CONSTITUTION AND STATUTES

	Page
United States Constitution, First Amendment	Passim
28 U.S.C. § 1254(1)	1
National Labor Relations Act, as amended:	
§ 8(a)(3), 29 U.S.C. § 158(a)(3)	Passim
§ 9(a), 29 U.S.C. § 159(a)	2,4,14
§ 19, 29 U.S.C. § 169; § 3 P.L. 93-360; P.L. 96-593	11,12
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, et seq.	
§ 703(a)(1), 42 U.S.C. § 2000e-2(a)(1)	Passim
§ 703(c)(3), 42 U.S.C. § 2000e-2(c)(3)	Passim
§ 701(j), 42 U.S.C. § 2000e(j)	Passim
Federal Rules of Civil Procedure, Rule 52(a)	3,28,30

CONGRESSIONAL MATERIALS

118 Cong. Rec. (92nd Congress, 2d Sess., January 21, 1972)	11,18,19,25
S.2109, 93rd Cong., 1st Sess. (1973)	12
S.2239, 95th Cong., 1st Sess. (1977)	12
S.1693, 96th Cong., 1st Sess. (1979)	12
H.R. 16541, 93rd Cong., 2nd Sess. (1974)	12
H.R. 1528, 94th Cong., 1st Sess. (1975)	12
H.R. 14911, 94th Cong., 2nd Sess. (1976)	12
H.R. 14913, 94th Cong., 2nd Sess. (1976)	12
H.R. 14916, 94th Cong., 2nd Sess. (1976)	12
H.R. 14920, 94th Cong., 2nd Sess. (1976)	12
H.R. 352, 95th Cong., 1st Sess. (1977)	12
H.R. 9009, 95th Cong., 1st Sess. (1977)	12
H.R. 9113, 95th Cong., 1st Sess. (1977)	12
H.R. 9368, 95th Cong., 1st Sess. (1977)	12
H.R. 9596, 95th Cong., 1st Sess. (1977)	12
H.R. 4774, 96th Cong., 1st Sess. (1979)	12

TABLE OF AUTHORITIES (Continued)

Page

OTHER AUTHORITIES

6 EEOC Ann. Rep. 12 (1972)........................... 11

EEOC Regulation 1605.1(c)............................ 16

Petitioner, International Association of Machinists and Aerospace Workers, AFL-CIO, Silvergate District Lodge 50, An Association, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in these proceedings on June 23, 1981.

OPINIONS BELOW

The second opinion of the Court of Appeals for the Ninth Circuit, reversing the second opinion of the District Court for the Southern District of California, are officially reported at 648 F.2d 1247 (9th Cir. 1981) and 489 F.Supp. 782 (S.D. Cal. 1980) and are set forth as Appendices "A" and "B", respectively.

This Court's denial of certiorari, 442 U.S. 921 (1979) (Justices White and Brennan would grant certiorari), followed the first opinion of the Court of Appeals for the Ninth Circuit, 589 F.2d 397 (9th Cir. 1978), *rehearing and rehearing en banc* denied January 16, 1979, reversing the opinion of the District Court for the Southern District of California, 431 F.Supp. 418 (S.D. Cal. 1977). Those decisions are set forth as Appendices "C", "D" and "E", respectively.

JURISDICTION

The Court of Appeals for the Ninth Circuit entered its second opinion and judgment on June 23, 1981. Justice Rehnquist entered an order extending the time for filing the petition for writ of certiorari until October 9, 1981, and this petition was filed prior to that date. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

The union security provisions of the National Labor Relations Act, as amended, § 8(a)(3), 29 U.S.C. § 158(a)(3), provide in relevant part:

> Nothing in this subchapter . . . shall preclude an employer from making an agreement with a labor organization . . .

> to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment. . . .

The second provision of § 158(a)(3) allowing for "financial core" membership provides in relevant part:

> [N]o employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

The National Labor Relations Act, as amended, 29 U.S.C. § 159(a), provides in relevant part:

> [A]ny individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract then in effect. . . .

The Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq., as amended, provides in relevant part as follows:

> It shall be an unlawful employment practice for an employer -
> (1) to fail or refuse to hire or to discharge any individual . . . with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; . . . 42 U.S.C. § 2000e-2(a)(1).
>
> It shall be an unlawful employment practice for a labor organization . . . (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section. 42 U.S.C. § 2000e-2(c)(3).

> For purposes of this subchapter . . . [t]he term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business. 42 U.S.C. § 2000e(j).

Rule 52(a), Federal Rules of Civil Procedure, provides in relevant part:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

STATEMENT OF CASE

On October 3, 1975, David Anderson (hereinafter referred to as "Respondent" or "Anderson") instituted this action in the District Court for the Southern District of California against his employer, General Dynamics Convair Aerospace Division (hereinafter referred to as "General Dynamics") and International Association of Machinists and Aerospace Workers, AFL-CIO, Silvergate District Lodge 50, An Association (hereinafter referred to as the "Union" or "Petitioner").

The jursidiction of the District Court was invoked pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000 et seq.

This case involves the termination of Respondent by General Dynamics pursuant to the request of the Union, for his failure to join or financially contribute to the Union. Respondent claimed a violation of

Title VII of the Civil Rights Act of 1964, as amended, based solely upon General Dynamics' and the Union's failure to accommodate his religious beliefs, pursuant to § 701(j) (42 U.S.C. § 2000e(j)). No claim was made by Respondent that his termination was based upon religious discrimination pursuant to § 703(a)(1) or 703(c)(3) (42 U.S.C. §§ 2000e-2(a)(1) or 2(c)(3)).

Respondent was employed by General Dynamics from October 11, 1956, until June 16, 1972. However, he was terminated and reinstated twice during that period for reasons discussed below. Since 1959, Respondent has been a member of the Seventh Day Adventist Church. It is a tenet and basic principle of this Church that its members should not belong to any labor union. Although the decision not to join or support a labor organization is left to the individual church member, Respondent has, during the pendency of the instant case, adhered to the conviction that joining or financially contributing to a labor union violates the tenets of the Church.

Between 1959 and April 3, 1972, the collective bargaining agreement between the Union and General Dynamics did not require that employees of General Dynamics become members of the Union. As a result, Respondent was able to work for General Dynamics during this period without belonging to the Union.

On two occasions during that period (in 1962 and 1968), Respondent was terminated by General Dynamics for refusing to work on the Sabbath of the Seventh Day Adventist Church. On both of those occasions, Respondent sought the Union's assistance and utilized the Union's grievance procedure to secure reinstatement even though he was not a Union member, had never contributed financially to the Union, and could have sought reinstatement on his own as sanctioned by § 9(a) of the National Labor Relations Act, as amended (29 U.S.C. § 159(a)).

During Respondent's employment with General Dynamics, he accepted wage increases and other benefits for which the Union had bargained, as well as made use of the upgrade review process and grievance procedure in the collective bargaining agreement.

On April 3, 1972, General Dynamics and the Union entered into their first union security agreement which required that all employees become members of the Union within ten (10) days after the thirtieth (30th) day following the effective date of the agreement.

Through conversations with a Union committeeman, Respondent was informed and understood that he would not have to participate in the Union's functions, but rather he would merely be required to pay dues. When Respondent refused to join or financially contribute to the Union, the Union committeeman suggested a charity substitution to which Respondent would not consent.

Respondent ultimately claimed that he had religious objections to joining or contributing to the Union, and did not join the Union within the time prescribed by the union security clause.

On May 25, 1972, the Union notified Respondent as to his delinquency relative to the requirements of the union security provisions. Thereafter, on June 12, 1972, Respondent informed General Dynamics, who in turn informed the Union, that his religious beliefs prohibited him from joining the Union. Thereafter, the Union sent a letter to General Dynamics requesting that Respondent be discharged for failure to join the Union. On June 16, 1972, Respondent was terminated by General Dynamics.

On September 27, 1972, Respondent filed a charge for failure to accommodate his religious beliefs against both General Dynamics and the Union with the Equal Employment Opportunity Commission (EEOC). On November 6, 1972, the EEOC deferred the charge to the California Fair Employment Practice Commission. The matter was referred back to the EEOC on December 6, 1972, and on April 12, 1974, a decision was entered finding reasonable cause to believe that Respondent was entitled to relief.

On July 15, 1975, the EEOC notified Respondent that conciliation efforts had failed and a "Notice of Right to Sue Within 90 Days" was issued to Respondent.

On October 3, 1975, Respondent sued General Dynamics and the Union in the United States District Court for the Southern District of California alleging a violation of Title VII of the Civil Rights Act of 1964, as amended, for failure to accommodate his religious beliefs.

The District Court found in favor of General Dynamics and the Union, concluding that anything less than payment of the equivalent of dues to the Union for charitable purposes would result in undue hardship to the Union. The Court recognized that non-payment of dues, or their equivalent, deprives the Union of the money it needs to negotiate for the benefit of employees and money to which it is entitled for services rendered. The Court also noted that the payment of money to a charity does not eliminate "free riders."

The District Court concluded that the Respondent's refusal to give the equivalent of dues to the Union to be paid to a charity of Respondent's choice, was based on his general distrust of unions, rather than on religious beliefs. Recognizing the overriding interest of the Union in carrying out its bargaining function with sufficient funds, the Court held that accommodation under the circumstances of this case was impossible because of Respondent's unyielding position. The District Court declined to reach the Union's claim that the reasonable accommodation provision of Title VII violates the Establishment Clause of the First Amendment to the United States Constitution.

Respondent appealed this decision and the Court of Appeals for the Ninth Circuit reversed, concluding that General Dynamics and the Union failed in their burden to establish undue hardship. The Court declined to address the question of whether the reasonable accommodation provision of Title VII violated the Establishment Clause of the First Amendment.

Following the denial of certiorari by this Court (the constitutional issue had not been decided at that time by the Court below), General Dynamics and the Union renewed their motions in the District Court for summary judgment on the Establishment Clause issue. The District Court granted General Dynamics' and the Union's motions, holding that § 701(j), the reasonable accommodation provision of Title VII, violated the Establishment Clause. Respondent appealed, and the Court of Appeals for the Ninth Circuit reversed, holding that § 701(j) and § 703(a)(1) and § 703(c)(3) are constitutional.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH THIS COURT'S HOLDING IN *TRANS WORLD AIRLINES, INC. V. HARDISON*, 432 U.S. 63 (1977)

In *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33 (8th Cir. 1975), the Court of Appeals for the Eighth Circuit held that an employee, who was unable to work on Saturday without violating the tenets of his religion, should have been accommodated by his employer even though this would have violated the seniority provisions of the collective bargaining agreement. In reversing the Court of Appeals, this Court held that the duty of accommodation under Title VII of the Civil Rights Act did not require the employer to violate an otherwise valid collective bargaining agreement. This Court held:

> [W]e do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement. Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79 (1977).

There is no reason to distinguish between the seniority provisions of the collective bargaining agreement in *Hardison* and the union security provision of the bargaining agreement in the instant case. As with the seniority provisions of the collective bargaining agreement in *Hardison*, the union security provision of the collective bargaining agreement in the instant case bears the imprimatur of congressional approval. The National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(3), provides the authorization for companies and unions to negotiate union security provisions in a collective bargaining agreement. Just as with seniority provisions, Congress recognized that union security provisions play an integral part in stable labor relations and industrial peace and have long been favored by Congress. *Yott v. North American Rockwell Corp.*, 501 F.2d 398, 400 (9th Cir. 1974).

In *Hardison*, this Court stated, "to require TWA to bear more than a de minimus cost in order to give Hardison Saturdays off is an undue hardship." *Trans World Airlines, Inc. v. Hardison, supra*, 432 U.S. at 84.

This Court recognized in *Hardison* that requiring TWA to violate its seniority provisions to give Hardison Saturdays off could only be done at the expense of other employees who may have had strong, but perhaps nonreligious reasons for not working weekends. This Court held that "Title VII does not require an employer to go that far." *Id.*, at 81.

In the instant case, the Court of Appeals for the Ninth Circuit would have those employees who do not object to union security clauses for religious reasons make up the fees lost from those employees who refuse to contribute. Increases in dues or loss of services would inevitably occur as it would be impossible for the Union, whose only source of income is initiation fees and dues, to continue to represent all employees without charging more from those who do contribute. This Court does not require a union to go this far.

A. The Court Of Appeals Has Interpreted Title VII Of The Civil Rights Act So As To Confuse The Concepts Of "Discrimination" And "Reasonable Accommodation" And Thereby Cause Recurrent Problems In The Interpretation Of The Civil Rights Act.

The Court below held that the second appeal squarely posed the issue of the constitutionality of 42 U.S.C. § 2000e-2(a) and (c) (discrimination provisions of Title VII) and 42 U.S.C. § 2000e(j) (reasonable accommodation provision of Title VII). The Court then held those provisions of Title VII to be constitutional for the reasons expressed in the companion case of *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981). That opinion is set forth in Appendix "F".

The Court below failed to realize that *Anderson* was brought solely under § 701(j) and unlike *Tooley*, no issue or question regarding the application or constitutionality of §§ 703(a)(1) and 703(c)(3) (the discrimination provisions), was under consideration. This appears to be a recurrent problem with this Circuit in that it has previously failed to distinguish between the concepts of "discrimination" and "reasonable accommodation." See *Lutcher v. Musicians Union, Local 47*, 633 F.2d 880 (9th Cir. 1980). The presence or absence of discriminatory intent was critical to this Court's analysis in *Hardison, supra*, 432 U.S. at 82.

Historically, Congress, in reaction to *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 334 (6th Cir. 1970), aff'd by an equally divided court, 402 U.S. 689 (1971) (a Sabbatarian case), enacted § 701(j) which incorporated the affirmative duty to accommodate into Title VII. However, its placement in Title VII is entirely distinct and separate from the provisions which prohibit employers and unions from committing acts of discrimination. Moreover, in contrast with the discrimination provisions, the reasonable accommodation provision of Title VII only references employers and not unions.

Thus, the significance of this Court's opinion in *Hardison, supra*, that absent a discriminatory purpose, a bona fide seniority system would not be set aside, has been lost on the Court below for the failure to distinguish between the discrimination and reasonable accommodation provisions of Title VII. *Trans World Airlines, Inc. v. Hardison, supra*, 432 U.S. at 82.

Finally, the Court of Appeals ignored the fact that the Union's grant of preferential treatment to a religious objector would be a direct violation of its union security agreement. The Court of Appeals has required the Union to suffer undue hardship in order to accommodate Respondent in violation of this Court's holding in *Hardison, supra*.

B. The Court Of Appeals Has Failed To Apply This Court's Principle, That In Evaluating Legislative History, Resort Should Be Made To The Statements Of Its Sponsors And No Amendment Or Repeal Of An Enactment May Be Made Without A Clear And Express Indication From Congress.

In *Hardison*, this Court set forth the principles that collective bargaining agreements would not be upset absent a discriminatory purpose and that requiring preferential treatment on a religious basis raised serious constitutional questions. *Id.*, 432 U.S. at 81-82.

Yet, in providing an exemption from the dues obligations of union security clauses, the Court below has not only sanctioned discrimination but has done so in the absence of a positive legislative history in the "dues" area.

In *Tooley v. Martin-Marietta Corp., supra*, 648 F.2d at 1245, the Court below failed to mention any supportive legislative history in concluding that § 701(j) applies to union security agreements instead of just to Sabbatarians.

This Court has long held that, "[n]o changes of law or policy are to be presumed . . . unless an intent to make such changes is clearly expressed." *Fourco Glass v. Transmirra Products Corp.*, 353 U.S. 222, 227 (1957). Accord: *Muniz v. Hoffman*, 422 U.S. 454, 470 (1975); *United States v. Ryder*, 110 U.S. 729 740 (1884).

The legislative history of the 1972 amendment, enacting § 701(j) only addresses Sabbatarian cases. To grant any exemption to the obligation of employees under a collective bargaining agreement containing a valid union security clause to pay their union dues, would have the effect of amending a congressional enactment without any express or implied congressional authorization.

This Court has declared, as a "cardinal rule" of construction, that "repeals by implication are not favored." *Morton v. Mancari*, 417 U.S. 535, 549 (1974). In interpreting labor legislation use of the remarks of the sponsors of the legislation are the favored method of determining its meaning. See *Wirtz v. Local 153, Glass Blowers*, 389 U.S. 463, 468 (1968); *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 619, 635-642 (1967).

The only cases mentioned and considered in the legislative history to § 701(j) involved Sabbatarians. 118 Cong. Rec. 706-713 (1972). *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970); *Riley v. Bendix Corp.*, 330 F.Supp. 583 (M.D. Fla. 1971).

Thus, without any express indication of Congressional intent to either amend the NLRA or to cover dues objectors under Title VII, the Court below has done both. Moreover, some six (6) days after the enactment of § 701(j), the EEOC stated in its Sixth Annual Report that it did not believe that Title VII applied to union security clauses on a religious basis. 6 EEOC Ann. Rep. 12 (1972), cited in *Yott v. North American Rockwell Corp., supra*, 501 F.2d at 399 n. 2.

The Court below erroneously noted that its exemption of dues objectors from otherwise valid union security clauses is consistent with a December 24, 1980 amendment to § 19 of the NLRA (29 U.S.C. § 169; P.L. 96-593). *Tooley, supra*, 648 F.2d at 1245 n. 10.

Since 1972, all attempts to provide a "religious objector" exemption to the NLRA's union security provisions have failed.[1] Even when a limited exemption was provided in 1974 for non-profit health care institutions (29 U.S.C. § 169; § 3 of P.L. 93-360), there was no indication that such exemption applied to any other employers.[2] The 1974 and 1980 amendments to the NLRA are set forth in Appendix "I".

The December 1980 amendment to the NLRA is substantially different from § 701(j) in that it contains no "undue hardship" exception, allows unions to charge objectors for processing their grievances, and excludes "minority" religions from its coverage. In these respects, its effect is not curative but instead invites constitutional challenges and leaves clouded the legitimacy of the NLRA amendment. See *e.g., Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

Thus, the Court below created an exemption which Congress had declined to enact. A union's grant of preferential treatment to a religious objector is a direct violation of its union security clause. The Court below has required the Union to suffer undue hardship to accommodate Respondent in violation of this Court's ruling in *Hardison*.

Accordingly, this Court should correct the failure of the Court below to follow this Court's ruling in *Hardison*; this Court should not allow modifications of a collective bargaining agreement "without a clear and express indication from Congress. . . ." *Hardison, supra*, 432 U.S. at 79.

---

[1] S. 2109 93rd Cong. 1st Sess. (1973); H.R. 16541, 93rd Cong., 2nd Sess. (1974); H.R. 1528, 94th Cong., 1st Sess. (1975); H.R. 14911, 94th Cong., 2nd Sess. (1976); H.R. 14913, 94th Cong., 2nd Sess. (1976); H.R. 14916, 94th Cong., 2nd Sess. (1976); H.R. 14920, 94th Cong. 2nd Sess. (1976); H.R. 352, 95th Cong. 1st Sess. (1977); H.R. 9009, 95th Cong., 1st Sess. (1977); H.R. 9113, 95th Cong., 1st Sess. (1977); H.R. 9368, 95th Cong., 1st Sess. (1977); H.R. 9596, 95th Cong., 1st Sess. (1977); S. 2239, 95th Cong. 1st Sess. (1977); S. 1693, 96th Cong., 1st Sess. (1979); H.R. 4774, 96th Cong., 1st Sess. (1979).

[2] See the discussion of this issue by Judge Rives in his dissent in *Cooper v. General Dynamics Convair Aerospace Div.*, 533 F.2d 163, 175-177 (5th Cir. 1976), and see especially, the portions of the legislative history of the health care amendments cited by Judge Rives at 176, and n. 6.

II

THE INTERPRETATION OF TITLE VII IN THE "DUES" AREA BY THE COURT OF APPEALS RESULTS IN IMPORTANT AND RECURRENT NATIONWIDE PROBLEMS IN THE ADMINISTRATION OF VALID UNION SECURITY CLAUSES IN COLLECTIVE BARGAINING AGREEMENTS

The vast majority of cases which have arisen under § 701(j) of Title VII are Sabbatarian cases. See *Trans World Airlines, Inc. v. Hardison, supra*; *Rohr v. Western Electric Company, Inc.*, 567 F.2d 829 (8th Cir. 1977); *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), affirmed by an equally divided Court, 429 U.S. 65 (1976), vacated for further consideration, 433 U.S. 903 (1977). These cases involved situations in which an employee refused to work on the Sabbath of his religion. Accommodating a Sabbatarian involves a rearrangement or readjustment of work schedules which can frequently be done with little or no impact on the union or on the employer's business. If employee grumbling or dissatisfaction results, it is generally limited to those employees who are directly affected by having to work for a religious objector on the Sabbath.

Accommodation in the fee area is a much more difficult task. Unlike Sabbatarian cases, a dues case strikes at the very heart of the union's existence because it presents a problem of a cutoff of the union's funds. The union's only source of income is initiation fees and dues. Any loss of these resources threatens the union's existence.

In addition, a dues case presents a conflict with the Congressional policy of having all employees pay their fair share of the costs of collective bargaining and administration of the union. Congress has sanctioned union security agreements as an integral part of our labor relations policy.

The obligation upon Respondent is only a limited financial one. He cannot be compelled to join the Union but only to pay his dues. Moreover, he is not required to participate in any of the Union's activities. See

N.L.R.B. v. General Motors Corp., 373 U.S. 734 (1963); *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17 (1954).

After studying the Congressional history of union shop agreements, the Court of Appeals in *Yott v. North American Rockwell Corp., supra*, 501 F.2d at 401 (9th Cir. 1974), held that Congress did not intend Title VII to modify the National Labor Relations Act's authorization of union security clauses.

Congress' realization that all employees must be required to pay for the services of the union is highlighted in this case. Respondent has benefited over the years from the Union's efforts in getting better wages, hours, and working conditions. Even more importantly, Respondent benefited directly from Union efforts on his behalf in 1962 and 1968 when he was fired for refusal to work on his Sabbath. Even though Respondent could have sought reinstatement on his own under 29 U.S.C. § 159(a), he requested the Union's help. The fund to which Respondent refuses to contribute is the very fund which financed the Union's representation of him in 1962 and 1968 in getting his job back.

The decision of the Court of Appeals places unions in an intolerable situation. Thousands of employees are covered by valid union security clauses of collective bargaining agreements under the National Labor Relations Act, as amended. To require a union to accommodate the religious idiosyncracies of its thousands of members would pose insurmountable problems in maintaining adequate financial resources necessary for its very existence.

Every time an individual refuses to pay union dues because of an alleged religious reason, the reasonable accommodation provision necessarily requires the union to spend time and money to determine whether the person's belief is part of an authentic religious creed, is sincerely held, and is the actual basis for the refusal to pay dues. With the number of religious sects increasing, and the plethora of other social, economic, and philosphical reasons for a person to refuse to pay union dues, a union is forced to make an extensive and costly investigation to protect itself from Title VII suits and lost dues.

Further problems result because of the resentment against "free riders" which saps union solidarity and strength. To require dues-paying members to shoulder the expense of non-paying members is understandably unfair when non-paying members continue to receive the same benefits. Both in bargaining and administering an agreement, "free riders" destroy the very stability which union security clauses were designed to achieve.

The state of the law in the dues area is so uncertain today that unions do not know their rights and duties under Title VII. Does anything less than full payment of dues to the union constitute undue hardship? Does payment to a charity of an equivalent amount of union dues constitute reasonable accommodation? Does reasonable accommodation require that the employee be able to choose the charity which will benefit from his dues? Does the law require a union, under pain of a Title VII case like this, to attempt to accommodate an individual when it is obvious that the employee will not accept any accommodation? Questions like these are illustrative of the recurring problems engendered by the Court of Appeals decision which will continue until this Court resolves the issues involved.

III

THE COURT BELOW HAS DECIDED THE CONSTITUTIONALITY OF A FEDERAL ENACTMENT IN A MANNER NOT IN ACCORDANCE WITH PRIOR APPLICABLE DECISIONS OF THIS COURT

The First Amendment to the United States Constitution provides in part that "Congress shall make no law respecting an establishment of religion. . . ." This Court on innumerable occasions has reiterated the following principle enunciated in *Everson v. Board of Education*, 330 U.S. 1 (1947):

> [T]he "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State." *Id.*, at 15-16.

In *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975) (dissenting opinion), the breach of the wall of separation was fully articulated:

> [B]y regulation 1605.1 and by 42 U.S.C. § 2000e(j), the Federal Government has breached the wall. The Regulation and § 2000e(j) grant preferences to employees by reason of their religion, forcing modifications in seniority systems, overtime scheduling, and other forms of employee organization. . . .
>
> Exemption from uniform work rules for religious reasons has been recognized as an unfair and undue preference under collective bargaining agreements. [citations omitted]
>
> Granting special privileges because of the exercise of one's religion is just as wrong as denying employment opportunity because of one's religious beliefs. When Government engages in either practice, it discriminates on the basis of religion and abandons its neutrality. *Id.*, at 555-556.

The Court below in utilizing this Court's tripartite establishment clause test as set forth in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), has not properly construed and enforced this Court's interpretations of that case and has expressly failed to consider the particular facts of the instant case. The Court below merely analyzed the facts of the companion case, *Tooley*, which involved allegations of discrimination as well as reasonable accommodation, thus distinguishing it from the instant case.

Application of the three-part establishment clause test set forth in *Committee for Public Education v. Nyquist, supra*, requires a finding that the reasonable accommodation provision of Title VII violates the Establishment Clause. In *Nyquist*, this Court stated that:

> [T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose . . . second, must have a primary effect that neither advances nor inhibits religion, . . . and third, must avoid excessive government entanglement with religion. . . . *Id.*, at 773 [citations omitted]

Where a statute is challenged on Establishment Clause grounds, each prong of the *Nyquist* test must be met. *Wolman v. Walter*, 433 U.S. 229, 236 (1977); *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). While the District Court found that § 701(j) could not meet any of the *Nyquist* tests, the Court below found that all the tests were satisfied.

A. The Duty Of Reasonable Accommodation Mandated By Section 701(j) Violates This Court's Tripartite Establishment Clause Test.

1. The Reasonable Accommodation Provision Lacks a "Clearly Secular Legislative Purpose."

It is well established that when legislation is challenged on Establishment Clause grounds, the legislature's stated purpose in adopting such legislation should be taken at its face value. *Committee for Public Education v. Nyquist, supra*, 413 U.S. at 773; *Meek v. Pittenger*, 421 U.S. 349, 363 (1975); *Sloan v. Lemon*, 413 U.S. 825, 829-830 (1973); *Hunt v. McNair*, 413 U.S. 734, 741-742 (1973); *Tilton v. Richardson*, 403 U.S. 672, 678-679 (1971); *Lemon v. Kurtzman, supra*, 403 U.S. at 613.

The legislative history of the 1972 amendment creating the duty of reasonable accommodation reveals that the amendment was motivated by sectarian impulses rather than by a problem of religious discrimination in employment requiring remedial legislation.

In the Senate discussions prior to the passage of the 1972 reasonable accommodation amendment, no legitimate secular purpose for the legislation was expressed or intimated. Indeed, Senator Jennings Randolph of West Virginia, who was not only the sponsor of the amendment but also a Sabbatarian, stated that his purpose in sponsoring the amendment was to assure increased church attendance by those whose religious beliefs prohibited work on certain days. He did not mention any business necessity exceptions to the application of the provision. Moreover, no benefit to the general public was proferred.

Senator Randolph's statements evidence a specific intent to only benefit and advance those employees with certain religious convictions. His remarks are most instructive.

> I say to the distinguished chairman of the Labor and Public Welfare Committee, who manages this bill, that there has been a partial refusal at times on the part of employers to hire or continue in employment *employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days.* So there has been, because of understandable pressures, such as commitments of a family nature and otherwise, *a dwindling of the membership of some of the religious organizations* because of the situation to which I have just directed attention.
>
> * * *
>
> My own pastor in this area, Rev. Delmer Van Horne, has expressed his concern and distress that *there are certain faiths that are having a very difficult time*, especially with the younger people, and understandably so, with reference to a possible inability of employers on some occasions to adjust to work schedules to fit the requirements of the faith of some of their workers. 118 Cong. Rec. 705 [Emphasis added]

While the entire legislative history of § 701(j) appears on but two pages, Senator Randolph repeatedly stressed his intent and objective to benefit Saturday Sabbatarians, of which he himself was one. 118 Cong. Rec. 705-706. The legislative history is set forth as Appendix "J".

The above described legislative history is devoid of indication that Congress intended other than to advance certain religious interests. It reflects an "abandon[ment of] secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization." *Gillette v. United States*, 401 U.S. 437, 450 (1971); see *Engel v. Vitale*, 370 U.S. 421, 430-431 (1962); *Torcaso v. Watkins, supra*, 367 U.S. at 495.

The remarks and intent of the sole sponsor should be dispositive of the source of the congressional intent. *NLRB v. Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964), citing *Schwegann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-395 (1951).

While the Court below concedes that the bill's sole sponsor in the Senate was concerned with the problems of Sabbatarians in particular, it viewed as persuasive Senator Randolph's statement that § 701(j) was intended to assure freedom from religious discrimination. *Tooley, supra*, 648 F.2d at 1245. No other legislative history of § 701(j) is cited by the Court below in support of its conclusion that § 701(j) has a "legitimate secular purpose."

Thus, while the Court below cited a remark of the bill's sponsor stating that § 701(j) was needed to prevent religious discrimination, the Civil Rights Act already contained specific language prohibiting religious discrimination. (42 U.S.C. § 2000e-2(a)(1) and 2000e-2(c)(3)).

This Court has recently restated the principle that in interpreting Establishment Clause cases, the avowed secular purpose of the legislation, even if stated in the law itself, is not sufficient to escape conflict with the First Amendment. *Stone v. Graham*, 449 U.S. 39, 41 (1980), citing *Abington School District v. Schempp*, 374 U.S. 203, 223 (1963).

Despite Senator Randolph's self-serving remarks that § 701(j) was needed to prohibit religious discrimination, there is no evidence to support his claim that such a need existed and his other remarks evidence a highly sectarian purpose.

In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), this Court constitutionally sanctioned the Federal Government's "set aside" public works construction projects for minorities in the face of equal protection arguments. However, in *Fullilove*, this Court reviewed the historical discrimination against blacks and concluded that such legislation was necessary to avoid the perpetuation of the effects of prior discrimination and to ensure that those businesses were not denied equal opportunities. *Id.*, at 477-478.

In reaching this result, this Court noted that it would not shirk from its responsibility of carefully scrutinizing the acts of the President and Congress for Constitutional infirmity. *Id.*, at 473.

The Court below has failed to give the reasonable accommodation clause "a most searching examination" in its constitutional dimensions even though it provides a preference based on religious criteria in violation of the principle enunciated by this Court in *Fullilove*. *Id.*, at 491-492.

2. The Reasonable Accommodation Provision Has a Primary Effect that Advances Religion.

The second prong of the *Nyquist* test requires analysis of whether a primary effect of the reasonable accommodation provision is to promote religion. *Nyquist, supra*, 413 U.S. at 783-784, n. 39.

The direct and immediate effect of the reasonable accommodation provision must neither advance nor inhibit religion.

The Court below resolved the "primary effect" prong of the *Nyquist* test by comparing "ancillary or incidental" benefits with "primary" benefits.

The benefit provided by exemption from an otherwise uniform provision is far different from an incidental benefit. Thus, the conferring of a benefit to all persons meeting nonreligious criteria does not have a principle effect of advancing religion merely because persons cannot be denied the benefit on the basis of their religion. *Everson v. Board of Education, supra,* 330 U.S. at 16; *Board of Education v. Allen,* 392 U.S. 236, 243-244 (1968).

The intentional creation of a class of religious employee beneficiaries cannot be justified on an incidental benefit theory. Religious concerns are "injected" into nonreligious contexts and religious activity is "promoted" to the exclusion of any other. Cf. *Walz v. Tax Commissioner,* 397 U.S. 664, 689 (1970).

Contrary to the Court below, merely because an avowed purpose of § 701(j) may be secular, the inquiry must not end there. Here the primary effect of § 701(j) is to advance religion. At the same time, the provision may violate two significant admonitions of this Court, *i.e.,* "aid all religions" and "prefer one religion over another." *Everson v. Board of Education, supra,* 330 U.S. at 15.

The District Court held in the instant case:

> The accommodation provision mandates religious discrimination. It requires an overt preference for the religious beliefs of certain employees and dictates that an employer [and union] must go out of his way to accommodate minority beliefs, even is such accommodation is detrimental to other employees. As such, its operation runs directly contrary to the avowed purpose of Title VII. 489 F.Supp. at 790.

The reasonable accommodation provision, as interpreted by the Court below, equates a failure to accommodate with religious discrimination. Thus, in effect, the provision requires preferential treatment of religious objectors to otherwise uniform contractual requirements without any finding of historical discrimination. It only benefits religious employees as opposed to non-religious or those of other religions with different tenets. It imposes affirmative obligations to require preferences for a class of religious objectors.

While the religious discrimination provisions of Title VII protect both religious workers on the basis of their faith and non-religious workers on the basis of their lack of faith, the reasonable accommodation provision does not provide a benefit to anyone except members of particular religious faiths. See *Yott v. North American Rockwell Corp.*, 428 F.Supp. 763, 766 (C.D. Cal. 1977), *affirmed on other grounds*, 602 F.2d 904 (9th Cir. 1979).

Clearly, the application of a "primary effect" test, results in a benefit to employees (and their church) who religiously oppose paying union dues. Here, Anderson under the circumstances of this case, would be permitted to obtain all the benefits of union membership, without financially contributing, solely on the basis of the teachings of his church. Paying the equivalent amount of money to a charity of his own choice still provides him with a benefit and privilege not available to the non-religious or persons of other religious persuasions. As such, it advances his church, gives him a special benefit not available to others, and gives him special status solely on the basis of religion.

Moreover, the concept of charity substitution is not provided for in § 701(j) and is merely a post hoc attempt to conceal the primary effect of favoritism to a particular class of religious objectors that otherwise exists on the face of the legislation.

The "accommodation" provisions are neither "evenhanded in operation" nor "neutral in primary impact." *Gillette v. United States*, 401 U.S. 437, 450 (1971). "An exception from a general obligation of citizenship on religious grounds [has] . . . run afoul of the Establishment Clause. . . ." *Wisconsin v. Yoder*, 406 U.S. 205, 220-221 (1972).

3. The Reasonable Accommodation Provision Excessively Entangles Government With Religion.

The failure of the Court below to conduct any evaluation whatsoever of the particular and unique facts of the instant case is most egregious when viewed in the context of the "entanglement" prong of *Nyquist*. The Court below merely reviewed the facts in *Tooley, supra.*

The Court below assumed that implementation of a substituted charity required minimal supervision and administration and that there would only be a slight administrative burden "once the sincerity of a religious objector's belief is established. . . ." *Tooley, supra*, 648 F.2d at 1246. The Court below made no inquiry or analysis of the facts relating to the sincerity of Anderson's religious beliefs or the administrative difficulties in dealing with Anderson.

The failure to factually review the "entanglement" issue is in direct conflict with the principles enunciated by this Court in *Lemon v. Kurtzman, supra,* 403 U.S. at 619; *Welsh v. United States*, 398 U.S. 333, 339 (1970); *United States v. Seeger*, 380 U.S. 163, 183-185 (1965); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979).

Political, idealogical or philosophical reasons, no matter how strong, cannot constitute valid reasons for granting exemption to financial obligations under union security clauses or afford protection under the reasonable accommodation provision. Cf. *Buckley v. American Fed. of Television & Radio Artists*, 496 F.2d 305 (2nd Cir. 1974), *cert. denied*, 419 U.S. 1093 (1974).

Justice Rehnquist, in his recent dissent in *Thomas v. Review Board of Indiana*, ___ U.S. ___, 101 S.Ct. 1425, 1436 (1981) aptly stated:

> By granting financial benefits to persons solely on the basis of religious beliefs, the State must necessarily inquire whether claimant's belief is "religious" and whether it is sincerely held.

The EEOC, FEPC, and the courts in a reasonable accommodation case are required to make a determination as to whether the belief asserted is to be characterized as "religious" and is protected under the law. In addition, those tribunals must determine not only whether these beliefs are sincere, but also the actual basis for the failure to pay union dues.

In *Gavin v. Peoples Natural Gas Co.*, 464 F.Supp. 622, 632 (W.D. Pa. 1979), *vacated and remanded* on other grounds, 613 F.2d 482 (3rd Cir. 1980), the District Court held that it could not proceed with the religious discrimination case before it without entangling the Court with religious beliefs and thereby "abandoning the constitutionally-mandated hands off attitude in matters of religion and conscience." The Court stated that it shuddered at the possibility of a "courtroom scene wherein experts would be cross-examined as to the legitimacy of a specific religious conviction."

In *National Labor Relations Board v. Catholic Bishop of Chicago, supra*, 440 U.S. at 502, this Court held that there would be a significant risk of infringement of the Religion Clauses of the First Amendment to the United States Constitution if the National Labor Relations Board (N.L.R.B.) exercised jurisdiction over church operated schools. This risk would occur because resolution of unfair labor charges by the N.L.R.B. would "necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." In addition, this Court stated that "it is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religious Clauses, but the very *process of inquiry* leading to findings and conclusions." *Id.* [Emphasis added]

In a manner identical with the N.L.R.B. in unfair labor practice cases, the EEOC and the courts, in reasonable accommodation cases, must inquire into the good faith of the employee's alleged religious refusal to pay union dues. They must also determine whether the belief stems from some bona fide religion. As in the case of N.L.R.B. inquiries, the "very process of inquiry" by the EEOC, FEPC, and the courts presents a risk of violation of the First Amendment.

The breadth of the "religious accommodation" provision leads inevitably to extensive review, first by the EEOC and then by the courts, of every phase of the employee's religious claim, the activities of his religious sect, the manifestations of that sect's beliefs, and the sincerity and motivation of the employee who seeks the accommodation. This Court has viewed this task as substantial. *Gillette v. United States, supra,* 401 U.S. at 456.

Senator Randolph contemplated and endorsed such involvement in his introduction of the 1972 amendment by giving the EEOC and its investigators flexibility and discretion in reviewing religious claims. 118 Cong. Rec. 706.

Such "flexibility" and "discretionary" judgment by government officials will inevitably give rise to the danger of "erratic decisionmaking" which has previously been identified as a primary source of improper entanglement. *Gillette v. United States, supra*, 401 U.S. at 458.

Judge Celebrezze foresaw this danger in his dissent in *Cummins v. Parker Seal Co., supra*, 516 F.2d at 559.

> [D]isposition of complaints under the amendment will require inquiry into the sincerity with which beliefs are held and force consideration of the validity of the religious nature of the claims, procedures which are not favored and may themselves be improper because they put courts in review of the religious matters.

In the instant case, the EEOC, FEPC, the District Court, and Court of Appeals have engaged in the very inquiry this Court in *Catholic Bishop, supra*, warned would entangle government with religion. The EEOC inquired into the good faith of Respondent's position and subsequently issued a Right to Sue Letter. 430 F.Supp. at 420. The District Court's inquiry resulted in a holding that Respondent's religious beliefs were not the basis for his refusal to pay union dues but rather that he was motivated by a general distrust of unions. *Id.*, at 420-421. The Court of Appeals on the first appeal made its own inquiry into the Respondent's sincerity and religious beliefs and found that his religious beliefs were the basis for his refusal to pay union dues. 589 F.2d at 401-402.

Thus, the Courts, as well as the EEOC, in evaluating Anderson's religious motivation have shown "flexibility" and "discretion" in reviewing "religious matters." Such conduct inevitably has given rise to "erratic decisionmaking."

The failure of the Court below to consider the administrative entanglement in any manner whatsoever in relationship to the facts of this case is inconsistent with the principles espoused by this Court. Had the Court below factually reviewed the administrative entanglement, particularly in regard to Anderson's motivation for not paying union dues, it would have found excessive entanglement.

IV

THE COURT BELOW HAS DECIDED AN IMPORTANT ISSUE OF FEDERAL LAW IN CONFLICT WITH A DECISION OF ANOTHER COURT OF APPEALS

The numerous cases which have divided on the constitutionality of § 701(j) have been noted by the Court below in *Tooley, supra*, 448 F.2d at 1244. Among those cases cited by the Court below as being in accordance with its position was *Nottelson v. A.O. Smith Corp.*, 643 F.2d 445 (7th Cir. 1981).

However, the Seventh Circuit in *Nottelson, supra*, 643 F.2d at 453, while in agreement with the Court below on the Establishment Clause issue[3], nevertheless was in direct conflict with the Court below on the preliminary constitutional question of whether this Court's dismissal of an appeal in *Rankins v. Commission on Professional Competence*, 24 Cal.3d 167, 593 P.2d 852 (1979), appeal dismissed, 444 U.S. 986 (1979), conclusively determined the constitutional validity of § 701(j).

---

[3] The decision of the Seventh Circuit contained an exceptionally strong dissent by Judge Pell on the constitutional issues which expressly adopted the District Court's opinion in *Anderson*, while cognizant that it was then before the Ninth Circuit. *Id.*, 643 F.2d at 456.

Thus, the Court below held that the dismissal of the appeal in *Rankins* by this Court did not bind it because this case and *Rankins* were brought under different statutes and involved entirely different kinds of accommodation. The Court below cited this Court's decision in *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) for its authority. *Tooley, supra*, 648 F.2d at 1244 n. 8.

The Seventh Circuit in *Nottelson v. A.O. Smith Corp., supra*, 643 F.2d at 453, in reaching a contrary result, cited this Court's opinion in *Hicks v. Miranda*, 422 U.S. 332, 343-344 (1975). The Seventh Circuit failed to note that *Mandel v. Bradley, supra*, 432 U.S. at 176, limited *Hicks* to "the precise issue presented and necessarily decided."

While the Seventh Circuit went on to decide the Establishment Clause issue presented in *Nottelson*, it nevertheless has interpreted a decision of this Court in a manner directly contrary to the Court below. In order to resolve the conflict between the Circuits and the conflict between this Court's opinion in *Mandel v. Bradley, supra*, with the Seventh Circuit's opinion in *Nottelson*, this Court should review the opinion of the Court below.

V

THE COURT BELOW HAS DECIDED AN IMPORTANT ISSUE OF FEDERAL LAW IN CONFLICT WITH A DECISION OF A FEDERAL DISTRICT COURT

Prior to the decision of the Court below, the District Court for the Northern District of Georgia, in an opinion not officially reported, found § 701(j) to be unconstitutional. *Isaac v. Butler's Shoe Corporation*, 25 E.P.D. Para. 31,757 (N.D. Ga. 1980). The CCH publication of this case is set forth as Appendix "G".

In reaching that result, the District Court, specifically found the "reasoning and conclusion set forth in *Anderson* to be persuasive." *Isaac v. Butler's Shoe Corporation, supra,* 25 E.P.D. at pp. 20315-20316. *Anderson* was subsequently reversed by the Court below.

The District Court in *Isaac v. Butler's Shoe Corporation, supra*, is thus in direct conflict with the Court below and specifically indicated that it did not feel bound by any Court above in rendering its decision.

In this particularly important area of constitutional law, the conflict between these two decisions should be resolved by this Court.

VI

THE CREATION OF A DE NOVO REVIEW BY THE COURT OF APPEALS IN VIOLATION OF RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THE ERRONEOUS NATURE OF THE DECISION BELOW REQUIRE THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION TO AVOID RECURRENT PROBLEMS

In construing Rule 52(a) of the Federal Rules of Civil Procedure (F.R.C.P.), this Court held in *United States v. Yellow Cab Co.*, 338 U.S. 338 (1949), in affirming a lower court judgment on direct appeal, that, "[f]indings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them." *Id.* at 341.

While the "clearly erroneous" provision of Rule 52(a) F.R.C.P. is not frequently invoked as a ground for granting of certiorari, in the instant case there are special and important reasons presented to grant the writ. The instant case is part of a trend in Title VII cases involving reasonable accommodation and/or religious discrimination where the courts substitute new findings of fact for those of the District Court.[4]

---

[4] The following reasonable accommodation and/or religious discrimination cases involve appellate court reversals of district court findings and opinions. *Dewey v.*

(Footnote 4 continued on page 29)

Thus, the District Court originally found:

> Plaintiff's refusal to give the equivalent of dues to the Union to be earmarked for a recognized charity of his own selection was based upon his general distrust of unions, rather than on religious beliefs. 430 F.Supp. at 422.

However, the Ninth Circuit, in reversing, found that "Anderson's motivation in selecting his own charity is irrelevant." *Anderson, supra*, 589 F.2d at 401.

There is no justification for the Court of Appeals to disregard as irrelevant the district court's finding on motivation for failure to pay union dues. Judge Denney held that despite the teachings of Anderson's church to not belong to or financially contribute to a labor organization and despite Anderson's belief in those teachings, his real motivation for not financially contributing to the Union was a distrust of unions.

In the instant case, the record testimony at the district court level is overwhelming that Respondent distrusted unions. In ignoring the finding of the District Court that Respondent's distrust of unions made accommodation by this Union impossible, the Court of Appeals gave no weight to the great advantage the District Court had in seeing, hearing, and judging the credibility of the witnesses. It also ignored its own prior ruling in *Yott v. North American Rockwell Corp., supra*, 501 F.2d at 402, n. 7, which noted the almost insurmountable difficulties in accommodating "dues" objectors.

(Footnote 4 continued from page 28)

Reynolds Metals Company, 429 F.2d 324 (6th Cir. 1970); *Riley v. Bendix Corporation*, 464 F.2d 1113 (5th Cir. 1972); *Reid v. Memphis Publishing Co.*, 468 F.2d 346 (6th Cir. 1972); *Young v. Southwestern Savings & Loan*, 509 F.2d 140 (5th Cir. 1975); *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975); *Draper v. U.S. Pipe & Foundry*, 527 F.2d 515 (6th Cir. 1975); *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33 (8th Cir. 1975); *Cooper v. General Dynamics, Convair Aerospace Div.*, 533 F.2d 163 (5th Cir. 1976); *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403 (9th Cir. 1978); and *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d 397 (9th Cir. 1978) and 648 F.2d 1247 (9th Cir. 1981).

In deciding the entanglement issue, the Court below applied the *Nyquist* test without reference to the facts of this case.

However, the District Court had ruled § 701(j) to be unconstitutional on all three *Nyquist* tests. To reach this result it indicated that the process of examining the sincerity of one's religious beliefs would be "difficult and time-consuming." *Anderson*, 489 F.Supp. at 791. The District Court, with great vision, then stated:

> The procedural history of the cases cited in this memorandum, with repeated appeal and remand, manifest a reluctance to deal with this problem. When the courts do attempt to tackle the merits of a claim of religious belief, the results are often confusing, inconsistent and evasive.
>
> Because of the potential for recurring litigation before courts and government agencies concerning difficult questions of the exercise of religious beliefs, the reasonable accommodation clause of Title VII causes excessive government entanglement with religion. *Id.*

This Court should exercise its supervisory powers not only to ensure that Rule 52(a) F.R.C.P. is respected in future Title VII religious accommodation and discrimination cases, but also to review the facts of this case and thereby render a decision which guides future reasonable accommodation litigants in the "dues" area as to the standards required by this Court.

This Court has neither rendered a decision on the constitutionality of § 701(j) nor provided guidance to Title VII litigants in "dues" cases as to the principles of law to be followed. Prior petitions for certiorari that were not granted by this Court had not yet received appellate court rulings on the constitutional issue. *Anderson v. General Dynamics*

Convair Aerospace Division, 442 U.S. 921 (1979); *Burns v. Southern Pacific Transportation Co.*, 439 U.S. 1072 (1979).[5]

At the present time, in addition to the instant case, both *Tooley v. Martin-Marietta Corp., supra*, and *Nottleson v. A.O. Smith Corporation, supra*, are all either before this Court or will soon be before this Court on petitions for writ of certiorari.

These aforementioned cases all are "dues" cases wherein the constitutional issue was decided. Moreover, *Nottleson* was decided over a strong dissent by Judge Pell, who expressly based his opinion on the opinion of Judge Schwartz in *Anderson*. *Anderson* was reversed by the Court below. Petitions for rehearing were denied and suggestions for rehearing *en banc* were denied in *Nottleson* apparently by an equally divided court. (The order recited that "a majority of the active members of the Court have not voted to grant a rehearing *en banc*," but noted that "Chief Judge Fairchild and Circuit Judges Pell, Wood and Bauer voted to grant the petition"). The order of the Seventh Circuit is set forth in Appendix "H".

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

OLINS, FOERSTER & SIEGEL

By: DOUGLAS F. OLINS

Attorneys for Petitioner

---

[5] These prior denials of certiorari by this Court are most certainly in deference to Chief Justice Marshall's admonition to interpret legislation so as to avoid questions of constitutional validity unless essential to the decision of a case. *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (2 Cranch 1804). Accord: *Gavin v. Peoples Natural Gas Co., supra*, 613 F.2d at 484 and cases cited therein.

Appendix

81-679

NO.________

Office - Supreme Court, U.S.
FILED
OCT 9 1981
ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,
SILVERGATE DISTRICT LODGE 50, AN ASSOCIATION,
Petitioner,

v.

DAVID ANDERSON,
Respondent,

and

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
Intervenor-Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OLINS, FOERSTER & SIEGEL
By: DOUGLAS F. OLINS
2718 Fifth Avenue
San Diego, California 92103
Telephone: (714) 297-7030

Counsel for Petitioner:
International Association
of Machinists and Aerospace
Workers, AFL-CIO, Silvergate District Lodge 50,
An Association

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

TABLE OF CONTENTS

Page

Opinion of the United States Court of Appeals for the Ninth Circuit in *Anderson v. General Dynamics Convair Aerospace Division*, 648 F.2d 1247 (9th Cir. 1981) A-1

Judgment and Memorandum of Decision of the United States District Court for the Southern District of California in *Anderson v. General Dynamics Convair Aerospace Division*, 489 F.Supp. 782 (S.D. Cal. 1980) B-1

Order Denying Petition For Writ of Certiorari by the United States Supreme Court in *International Association of Machinists and Aerospace Workers, AFL-CIO, etc. v. Anderson*, 422 U.S. 921 (1979) C-1

Opinion of the United States Court of Appeals for the Ninth Circuit in *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d 397 (9th Cir. 1978), *rehearing and rehearing en banc* denied January 16, 1979 .... D-1

Memorandum and Judgment of the United States District Court for the Southern District of California in *Anderson v. General Dynamics Convair Aerospace Division*, 413 F.Supp. 418 (S.D. Cal. 1977) E-1

Opinion of the United States Court of Appeals for the Ninth Circuit in *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981) F-1

Opinion of the United States District Court for the Northern District of Georgia in *Isaac v. Butler's Shoe Corp.*, 25 E.P.D. par. 31,757 (N.D. Ga. 1980). G-1

Order of the United States Court of Appeals for the Seventh Circuit Denying Petitions for rehearing and suggestions for rehearing *en banc* in *Nottelson v. A. O. Smith Corp.*, (April 20, 1981) H-1

TABLE OF CONTENTS (Continued)

Page

§ 19 (29 U.S.C. § 169) of the National Labor Relations Act, as Amended by § 3 of P.L. 93-360 (1974) and P.L. 96-593 (1980) I-1

Legislative History of § 701(j) (2000e(j)) of the Civil Rights Act of 1964, as amended J-1

ANDERSON v. GENERAL DYNAMICS CONVAIR AEROSPACE DIV.

David ANDERSON, Plaintiff-Appellant,
and

Equal Employment Opportunity Commission, Intervenor-Appellant,
v.
GENERAL DYNAMICS CONVAIR AEROSPACE DIVISION, a Corporation and International Association of Machinists and Aerospace Workers, AFL-CIO, Silvergate District Lodge, an Association, Defendants-Appellees.

No. 80-5373.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 15, 1981.

Decided June 23, 1981.

Religious discrimination action was brought, and judgment was entered, 430 F.Supp. 418. The Court of Appeals, 589 F.2d 397, reversed and remanded, and the United States District Court for the Southern District of California, Edward J. Schwartz, Chief Judge, again entered judgment, 489 F.Supp. 782, and appeal was again taken. The Court of Appeals, Hug, Circuit Judge, held that provisions in Title VII governing reasonable accommodations to be made for employees' religious beliefs were constitutional and did not violate establishment clause.

Reversed and remanded.

Civil Rights 2.1
Constitutional Law 84

Provisions in Title VII governing reasonable accommodations to be made for employees' religious beliefs were constitutional and did not violate establishment clause. Civil Rights Act of 1964, §§ 701(j), 703(a, c) as amended 42 U.S.C.A. §§ 2000e(j), 2000(e)-2(a, c); U.S.C.A. Const. Amend. 1.

Appeal from the United States District Court for the Southern District of California.

Before HUG, TANG and FARRIS, Circuit Judges.

HUG, Circuit Judge:

This is a Title VII action in which Anderson claims he was discharged from his employment in violation of the religious discrimination provisions of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) & (c) and 42 U.S.C. § 2000e(j). This case is before us for the second time on appeal. On the first appeal we considered only the question of whether a reasonable accommodation to Anderson's religious beliefs had been made in accordance with the provisions of Title VII; we did not consider whether those provisions were constitutional. This appeal poses the issue of the constitutionality of the provisions under the establishment clause of the first amendment.

Anderson, a former employee of General Dynamics Convair Aerospace Division (General Dynamics), brought this Title VII action against General Dynamics and the International Association of Machinists and Aerospace Workers, AFL-CIO, Silvergate District Lodge 50 (the Union), claiming that he had been discharged in violation of the religious discrimination provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a) & (c), 2000e(j). He sought reinstatement of employment and benefits, an injunction restraining the Union from discriminating against him, back pay and allowances, reasonable attorney's fees, costs and interest. The district court held that no accommodation to Anderson's religious beliefs was possible because his offer to contribute the amount of Union dues to a charity of his choice, rather than to the Union or charities of the Union's choice, imposed an undue hardship on the Union. *Anderson v. General Dynamics Convair Aerospace Division*, 430 F.Supp. 418 (S.D.Cal. 1977).

In Anderson's first appeal, General Dynamics and the Union failed to carry their burden of proof that they could not reasonably accommodate Anderson's religious convictions without undue hardship. The judgment of the trial court was reversed and remanded. *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d 397 (9th Cir. 1978), *cert. denied*, 442 U.S. 921, 99 S.Ct. 2848, 61 L.Ed.2d 290 (1979). We noted that the district court had not reached the constitutional issue and, under those circumstances we declined to do so. *Id.* at 402 n.5, 489 F.Supp. 782. On remand, the district court did consider the issue and determined that the Title VII provision, pursuant to which the accommodation was ordered, was unconstitutional on its face under the establishment clause. The district court entered judgment for appellees, and ruled that each party should bear its own costs. It is from this judgment that Anderson now appeals.

This appeal squarely poses the issue of the constitutionality of 42 U.S.C. § 2000e-2(a) & (c) and 42 U.S.C. § 2000e(j). We hold that those provisions of Title VII are constitutional for the reasons expressed in our opinion in *Tooley v. Martin Marietta Corp.*, No. 80-3029, Slip op. p. ___, ___ F.2d ___ (9th Cir. 1981), which was argued with this case, on the same date, before this panel. We therefore reverse and remand for entry of judgment consistent with this opinion. We also conclude that Anderson is entitled to a reasonable attorney's fee as a part of his costs, pursuant to 42 U.S.C. § 2000e-5(k), in an amount to be fixed by the district court on remand.

REVERSED and REMANDED.

FILED
ENTERED
LODGED
RECEIVED

MAY 2 1980

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

FILED
ENTERED
LODGED
RECEIVED

MAY 5 1980

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
DISTRICT COURT DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID ANDERSON,
Plaintiff,

v.

GENERAL DYNAMICS CONVAIR AEROSPACE DIVISION, a Corporation, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, SILVERGATE DISTRICT LODGE 50, an Association.
Defendants.

Civil No. 75-857-S

JUDGMENT

Having considered the arguments of counsel as presented in the written briefs on the defendants' Motions for Summary Judgment, all parties having waived oral argument, and defendants' Motions for Summary Judgment having been granted;

IT IS HEREBY ORDERED AND ADJUDGED that judgment is in favor of the defendants and against the plaintiff, and plaintiff shall take nothing by his complaint. Each of the parties shall bear his respective costs incurred herein.

DATED: May 2, 1980.

EDWARD J. SCHWARTZ, Chief Judge
United States District Court

Copies to all parties.

FILED
ENTERED
LODGED
RECEIVED
MAY 2 1980
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY [illegible] DEPUTY

FILED
ENTERED
LODGED
RECEIVED
MAY 5 1980
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY [illegible] DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID ANDERSON, Plaintiff v. **GENERAL DYNAMICS CONVAIR AEROSPACE DIVISION, a Corporation, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, SILVERGATE DISTRICT LODGE 50, an Association,** Defendants.	Civil No. 75-857-S **MEMORANDUM OF DECISION**

SCHWARTZ, J.,

Plaintiff, David Anderson, an employee of General Dynamics Convair Aerospace Division ("General Dynamics") brought this Title VII action against General Dynamics and the International Association of Machinists and Aerospace Workers, AFL-CIO, Silvergate District Lodge 50 ("Union"), claiming that he had been discharged in violation of the religious discrimination provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) and 2000e(j). He sought reinstatement of employment benefits, an injunction restraining the Union from discriminating against him, back pay and allowances, attorneys' fees, costs and interest.

Anderson was first employed by General Dynamics in 1956. In 1959 he became a member of the Seventh Day Adventist Church. A tenet of the church is that its members should not belong to or contribute to labor organizations. Prior to 1972, the collective bargaining agreement between General Dynamics and the Union did not require General Dynamics to employ only Union members. On April 3, 1972, however, a new agreement became effective which contained a provision requiring all employees to join the Union.

Anderson did not join the Union, advising his employer that his religious beliefs prohibited such action. Thereupon, the Union requested that Anderson be discharged and on June 16, 1972, General Dynamics discharged Anderson for the sole reason that he refused to become a member of or contribute to the Union.

After petitioning the Equal Employment Opportunity Commission, ("EEOC") Anderson brought this action. On February 2, 1977, a trial was held in this district before Judge Robert V. Denney, sitting by designation. Judge Denney held that because an accommodation of Anderson's religious beliefs was impossible under the circumstances of the case Title VII was not violated, and judgment was entered for defendants.

Anderson appealed to the Ninth Circuit Court of Appeals, *Anderson v. General Dynamics*, 589 F.2d 397 (9th Cir. 1978). That court held that a reasonable accommodation could be made with Anderson paying to a charity an amount of money equivalent to the applicable Union dues. The judgment of the trial court was reversed and the case was remanded back to this court to determine the amount of attorenys' fees to be awarded to Anderson pusuant to 42 U.S.C. § 2000e-5(k).

In their answers to the complaint, the defendants had raised the issue of the constitutional validity of the accommodation provisions of § 701(j) of Title VII, 42 U.S.C. § 2000e(j), in light of the Establishment Clause of the First Amendment to the United States Constitution. Judge Denney in his memorandum opinion, however, stated that since an accommodation was impossible "it is unnecessary to reach defendants' claim that Title VII violates the Establishment Clause of the First Amendment." The Ninth Circuit noted, at 589 F.2d 402, n. 5, that the constitutional issue was raised "at least obliquely" on appeal. Since the

District Court did not reach the constitutional issue, however, the Ninth Circuit "also decline[d] to address any constitutional questions." *Id.*

On remand, the constitutionality of § 701(j) is again presented to this court by way of defendants' Motions for Summary Judgment. This issue is properly presented at this time.[1] Because of the controlling decision in this case by the Ninth Circuit, however, there is no issue as to any material fact affecting the constitutional issue.

The defendants urge this court to hold that the accommodation provision of § 701(j) is unconstitutional as an impermissible intrusion against the Establishment Clause of the First Amendment to the United States Constitution. The importance of the constitutional issue requires a detailed review of the history of § 701(j), the applicable constitution standards, and the cases which have attempted to deal with the issue.

No Ninth Circuit or United States Supreme Court decision directly addresses this issue. A number of decisions from district courts and other Circuit Courts of Appeal have been cited by the parties as persuasive authority. These decisions reveal a tortuous and inconclusive path toward resolution of this difficult issue.

I

LEGISLATIVE HISTORY

Congress enacted the Civil Rights Act of 1964[2] primarily to prohibit various forms of racial discrimination throughout the nation.[3] Specifically, Title VII[4] of the Act was designed to eliminate such discrimination in employment practices. Title VII also includes a phrase which prohibits employers or prospective employers from discrimination in the employment or discharge of workers on the basis of religion.[5] Religion was not defined in this enactment.

---

[1] See *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403, 407-408 (9th Cir. 1978) which states that the constitutional question is a proper one for consideration on remand even if the question was not presented to the District Court and was raised for the first time in the Court of Appeals.

[2] 42 U.S.C. §§ 2000a, et seq.

[3] The goal of the Civil Rights Act was to eliminate the "glaring . . . discrimination against the Negroes which exists throughout our nation." H.R. Rep. No. 914, 88th Cong., 1st Sess. 18 (1963).

[4] 42 U.S.C. §§ 2000e to 2000e-15 (1970), as amended, 42 U.S.C. §§ 2000e to 2000e-17 (1974).

As stated in *TWA v. Hardison*, 432 U.S. 63 (1977):

> The emphasis of both the language and the legislative history of the statute is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin.

Id. at 71.

The prohibition against religious discrimination soon raised the question of whether it was impermissible under 42 U.S.C. § 2000e-2(a)(1) to discharge or refuse to hire a person who for religious reasons refused to work during the employer's normal workweek. *Id.* at 72. In 1966 an EEOC guideline dealing with this problem declared that an employer had an obligation under the statute "to accommodate to the reasonable religious needs of employees . . . where such accommodation can be made without serious inconvenience to the conduct of the business." 29 C.F.R. § 1605.1 (1967).

In 1967 the EEOC amended its guidelines to require employers "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business." 29 C.F.R. § 1605.1 (1968).

In 1972 Congress attempted a definition of religion in its amendments to Title VII:

---

[5] 42 U.S.C. § 2000e-2(a)(1) provides:

(a) It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

§ 701(j), 42 U.S.C. § 2000e(j). The intent and effect of this definition and stricture was "to make it an unlawful employment practice under § 703(a)(1) [42 U.S.C. § 2000e-2(a)(1)] for an employer not to make reasonable accommodations short of undue hardship, for the religious practices of his employees and prospective employees." *TWA v. Hardison*, *supra*, 432 U.S. at 74.

This statutory obligation of accommodation to the religous beliefs of an employee is precisely what defendants assert is violative of the Establishment Clause of the First Amendment.

II

CONSTITUTIONAL STANDARDS

The First Amendment to the United States Constitution provides in part that "Congress shall make no law respecting an establishment of religion . . ." The Supreme Court on many occasions has reiterated the principle enunciated in *Everson v. Board of Education*, 330 U.S. 1 (1947):

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

Id. at 15-16.

In determining whether a statute is, indeed, in violation of the proscription of the Establishment Clause, courts of the United States take the following approach, enunciated, after a consideration of precedent, in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973):

> Taken together, these decisions dictate that to pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, . . . second, must have a primary effect that neither advances nor inhibits religion, . . . and, third, must avoid excessive government entanglement with religion . . . [Citations omitted.]

Id. at 772-773.

III

APPLICABLE DECISIONS

A number of decisions have considered the EEOC guideline and § 701(j) in light of the *Nyquist* three-part approach with inconsistent results.

In *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), an employee was discharged because he failed to perform scheduled overtime work on Sunday as required by a collective bargaining agreement. The employee claimed that such Sunday work would violate his religious beliefs. The court held that there was no discrimination on the basis of religion, and hence no violation of Title VII, because all employees were treated alike. The court also noted that *if* the EEOC guideline was applied, the employer made a reasonable accommodation by instituting a system whereby an employee could find a replacement to work offensive or inconvenient hours.

In denying a petition for rehearing, the *Dewey* court stated:

> Nowhere in the legislative history of [Title VII] do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another. The requirement of accommodation to religious beliefs is contained only in the EEOC Regulations, which in our judgment are not consistent with [Title VII].
>
> * * *
>
> To construe the Act as authorizing the adoption of Regulations which would coerce or compel an employer to accede to or accommodate the religious beliefs of all of his employees would raise grave constitutional questions of violation of the Establishment Clause of the First

> Amendment. It is settled that the Government, in its relations with religious believers and nonbelievers, must be neutral. The Government is without power to support, assist, favor or handicap any religion.

Id. at 334-335. Such language by the Sixth Circuit makes it clear that not only was the EEOC guideline inconsistent with the dictates of Title VII, but it also might be a violation of the Establishment Clause. The *Dewey* case was affirmed by an equally divided Supreme Court, 402 U.S. 689 (1971).[6]

In *TWA v. Hardison*, 432 U.S. 63 (1977), the Supreme Court was given an opportunity to determine whether the EEOC guideline was unconstitutional. In that case an employee was discharged because his religion prevented him from working on Saturdays. The court held that because no reasonable accommodatin could be reached Title VII was not violated. Therefore, it did not have to decide the constitutional question. *Id.*, at 70,[7] 975 S.Ct. at 2269.

The Sixth Circuit again examined the EEOC guidelines in *Reid v. Memphis Publishing Company*, 468 F.2d 346 (1972), and stated that doubts about the constitutionality were laid to rest by *Griggs v. Duke Power Company*, 401 U.S. 424 (1971). The Supreme Court in *Griggs*, a racial discrimination case, had held that it was not necessary to show discriminatory intent to make out a violation of Title VII; discriminatory effect was enough if not shown to be "related to job performance." The Sixth Circuit argued that this "business necessity" test applied to religious discrimination, so that if there was a discriminatory effect the employer must show a valid business reason for the employment practice. *Reid, supra*, 468 F.2d at 350.[8]

---

[6] Mr. Justice Harlan took no part in the consideration or decision of the case.

Judgment entered by an equally divided court is not "entitled to precedential weight." *Neil v. Biggers*, 409 U.S. 188, 192 (1972). See also, *TWA v. Hardison*, 432 U.S. 63, 73, n. 8 (1977).

It was the decision in *Dewey* which ultimately led to the 1972 amendment to Title VII, § 701(j). See *TWA v. Hardison, supra*, 432 U.S. at 73.

[7] Justice Marshall in dissent seems to beg the question when he states that the regulation is consistent with the First Amendment:

> If the State does not establish religion over nonreligion by excusing religious practitioners from obligations owed by the State, I do not see how the State can be said to establish religion by requiring employers to do the same with respect to obligations owed the employer.

Id. at 90-91.

It should be noted that the Eighth Circuit had addressed the issue and held that the statute was constitutional in light of *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975) to be discussed in this memorandum. *Hardison v. TWA*, 527 F.2d 33, 44 (9th Cir. 1975).

After Congress enacted § 701(j), the Sixth Circuit took a longer look at the "reasonable accommodation" provision in light of the *Nyquist* three-step approach. In *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), an employee claimed he had been discharged because his religion prohibited him from working on Sundays and other holy days. The majority held the statute was constitutional and the employer failed to make a showing that undue hardship would be occasioned by accommodating its business to the employee's religious practices. Judge Celebrezze in dissent argued that § 701(j) was in violation of the Establishment Clause.

The majority held that the reasonable accommodation rule, "like Title VII as a whole," had an adequate secular purpose: to prevent discrimination in employment. The court cited Senator Randolph's stated purpose in promoting the 1972 amendment:

> "[I]t is my desire and I hope the desire of my colleagues, to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law." 118 Cong. Rec. 705 (1972).

Id. at 552. The court also expressed its view that, like the conscientious objector exemption to the draft, there was a pragmatic neutral purpose underlying the statute:

---

[8] This may be the rule. This court finds unpersuasive the extension of such rule to the proposition that an obligation to accommodate someone's religion is constitutionally valid. In a later case, the Sixth Circuit admitted that it had not "discuss[ed] specifically the establishment clause problem." *Cummins v. Parker Seal Co.*, 516 F.2d 544, 551 (1975).

> [T]he reasonable accommodation rule reflects a legislative judgment that, as a practical matter, certain persons will not compromise their religious convictions and that they should not be punished for the supremacy of conscience.

Id. at 552-553.

Next, the majority held the statute had a "primary effect" of guaranteeing job security by restraining employers from enforcing uniform work rules that, although facially neutral, discriminated in effect against employees holding certain religious convictions. *Id.* The majority also stated that § 701(j) did not raise the spectre of excessive government entanglement because it would require little or no contact between religious institutions and governmental entities. *Id.*

Judge Celebrezze disagreed. He pointed out that the expressed purpose of Title VII was to end discrimination based on certain factors that had no relation to an individual's ability and initiative. "The object was to make religion a meaningless factor in employment decisions." The new amendment, "[r]ather than 'putting teeth" into the Act, . . . mandates religious discrimination, thus departing from the Act's basic purpose." *Id.* at 556. As to the majority's second alleged "secular" purpose, he noted that the absence of a religious accommodation rule would not amount to punishment for religious conviction: "It would simply be a 'hands-off' attitude on government's part." *Id.*

Instead, Judge Celebrezze pointed to other remarks made by Senator Randolph which evidence the true purpose of the 1972 amendment: the promotion of certain religions whose followers' practices conflict with employers' schedules.[9]

As to the "primary effect" of the statute, Celebrezze argued that first, the religious accommodation requirement discriminates between religion and nonreligion; and, second, it discriminates among religions. Only those employees with "religious practices" who manifest their belief in acts requiring modification of an employer's work rules benefit from the statute.

---

[9] The remarks are quoted at p. 17 of this memorandum.

Celebrezze did not address in detail the question of entanglement. He only noted that the disposition of complaints under the amendment would result in a procedural morass.

Cummins was affirmed by an equally divided Supreme Court, 429 U.S. 65 (1976).[10]

In *Yott v. North American Rockwell Corp.*, 428 F.Supp. 763 (1977) the Central District of California took the opportunity to rule on the question of constitutionality. The employee in that case refused to pay union dues because his religious beliefs prohibited him from membership in any union or other temporal organization. Because of his refusal, he was terminated by his employer pursuant to the terms of a collective bargaining agreement. The court held § 701(j) unconstitutional, specifically disapproving the majority analysis in *Cummins*. *Yott, supra*, 428 F.Supp. at 765.

The court noted that the "secular purpose" ascribed to the statute by the *Cummins* majority was that "the rule was designed to put teeth in the existing prohibition of religious discrimination." *Id.* at 766, citing *Cummins*. In response the court stated:

> Realistically nothing could be further from the truth. . . . "Teeth" are put into the law by a comprehensive enforcement system which includes action by the Equal Employment Opportunity Commission and the Attorney General of the United States.

Id. The court stressed that government must remain neutral, which it could not do under § 701(j):

> Government simply cannot make the choice - termed reasonable or otherwise - that conduct which lacks either discriminatory intent or discriminatory application can be circumscribed because religious beliefs may oppose its implementation. Faced with such a decision government must declare its neutrality.

Id. at 767.

---

[10] Justice Stevens took no part in the consideration or decision of the case. See also, fn. 6, ante.

The Central District then appended a "Supplementary Opinion" in which it held that under the facts of the case no reasonable accommodation could be had. *Id.* at 767-770. On appeal to the Ninth Circuit, the Court of Appeals, at 602 F.2d 904 (9th Cir. 1979), seized upon the holding in the Supplementary Opinion, concluded that the trial court's decision that there could be no reasonable accommodation was not clearly erroneous and affirmed the decision "without reaching the question of whether Section 701(j) is unconstitutional." *Id.* at 906.

In January, 1979, the Western District of Pennsylvania ruled the statute unconstitutional in *Gavin v. Peoples Natural Gas Co.*, 464 F.Supp. 622. In *Gavin* an employee was discharged because he failed to perform his duty of raising and lowering the company's American flag. The employee asserted it was against his religious beliefs as a Jehovah's Witness.

After reviewing a selection of Establishment Clause cases, the court noted that the question of encouraging religion "is often one of balancing legitimate state interests against prohibited results or one of the degree of involvement between church and state." *Id.* at 627. The court went on to discuss § 701(j) in light of the *Nyquist* standard.

Citing *Cummins* and the District Court in *Yott*, the judge in *Gavin* "recognize[d] that there are valid arguments to be made on both sides of the test of 'secular purpose' with this amendment." *Id.* at 629. He also remarked that "whether the effect of the amendment is primarily to advance religion is an unsettled question." *Id.* He cited the dissent in *Cummins* and a number of religion cases which did not reach the constitutional issue in concluding that "individuals of certain religious beliefs have been benefiting under the 1972 amendment." Also citing *Catholic Bishop of Chicago v. N.L.R.B.*, 559 F.2d 1112, 1129 (7th Cir. 1977), aff'd 440 U.S. 490 (1979), the court noted that the employer raised serious cnstitutional challenges to the validity of the amendment under the "purpose" and "effect" tests. The judge believed, however, that "these questions could better be resolved by an appellate court on an appropriate record." *Gavin, supra*, 464 F.Supp. at 630.

The "excessive entanglement" prong of the *Nyquist* test was then considered. The *Gavin* court concluded that proceeding to trial on the facts of that case would necessarily lead to an entanglement of the court with religious beliefs, "requiring us to abandon the constitutionally-mandated 'hands off' attitude in matters of religion and conscience." *Id.* at 632. In this respect, the court pointed out the difficulties in making a determination of sincerity of religious belief, and the fact that these decisions would ultimately have to be made by administrative agencies and courts. Hence, the court held it could not constitutionally apply the statute.[11]

In *Burns v. Southern Pacific Transportation Co.,* 20 EPD par. 30,184, pp. 11,977-11,978 (1979), the District of Arizona held the statute constitutional without discussion.

In *Tooley v. Martin-Marietta Corp.,* 476 F.Supp. 1027 (1979), the District of Oregon sought a balance between the Free Exercise Clause and the Establishment Clause. This case involved a religious proscription against payment of union dues. The court held that the religious accommodation provision of Title VII "accommodates the free exercise of religion without violating the Establishment Clause." *Id.* at 1029.[12] The court gave the *Nyquist* criteria the following total treatment:

> If this test governs these facts, the test is satisfied. It is a neutral provision with a satisfactory purpose--to prevent discrimination resulting from the unreasonable refusal to

---

[11] The Third Circuit reversed and remanded *Gavin* without reaching the constitutional issue. *Gavin v. Peoples Natural Gas Co.,* 613 F.2d 482 (3rd Cir. 1980). The court held that no summary judgment could have been properly rendered under F.R. Civ.P. 56 because there remained an issue of material fact, namely, whether the alleged accommodation complied with Title VII:

> "The general rule . . . is to avoid constitutional issues unless essential to the decision of the case.
>
> * * *
>
> . . . [T]he constitutional issue presupposes lack of accommodation. However, the question of whether PNGC accommodated to Gavin's beliefs . . . was never resolved."

Id. at 484-485. The case was remanded to the District Court for this determination.

[12] Also see *Jordan v. North Carolina Nat'l Bank,* 399 F.Supp. 172, 179-180 (W.D. N. Carolina 1975) where the court held the statute constitutional by striking the balance in favor of free exercise.

> accommodate religious beliefs and practices. A reasonable accommodation will not favor plaintiffs or their religion because plaintiffs agree to contribute to charity an amount equal to union dues. A reasonable accommodation will not result in government entanglement with religion greater than approved in *Yoder, Gillette, Walz,* and *Sherbert.*[13]

Tooley, supra, 476 F.Supp. at 1030. The court held that the plaintiffs were entitled to an injunction prohibiting their discharge as long as they made contributions to charity equal to union dues.

Some state courts have found a duty to accommodate in state employment statutes.[14] But only two courts have confronted the constitutional issue, both finding no violation of the Establishment Clause.[15] The commentators are in disagreement.[16]

---

[13] *Wisconsin v. Yoder,* 406 U.S. 205 (1972); *Gillette v. U.S.,* 401 U.S. 437 (1971); *Walz v. Tax Commission,* 397 U.S. 664 (1970); *Sherbert v. Verner,* 374 U.S. 398 (1963).

[14] The courts of California, Alaska, Maine and Wisconsin have found such a duty. *Rankins v. Commission of Professional Competence of Ducor,* 154 Cal.Rptr. 907 (1979); *Wondzell v. Alaska Wood Products, Inc.,* 583 P.2d 860 (Ala. 1978); *Maine Human Rights Commission v. Local 1361, United, etc.,* 383 A.2d 369 (Me. 1978); *American Motors Corp. v. Dept. of Industry, Labor & Human Relations,* No. 77-703 (Wis. Court of Appeals, Dist. IV, Nov. 2, 1979).

[15] California and Wisconsin. See fn. 14, ante.

[16] See, e.g., Wheeler, "Establishment Clause Neutrality and the Reasonable Accommodation Requirement," 4 Hastings Const. L. Q. 901, 931-934 (1977). The author contends that a reasonable accommodation rule is constitutional as seen under a theory of benevolent neutrality:

> A characterization of benevolent neutrality would be one of a broad area between "what is prohibited by the establishment clause and what is required in the name of free exercise" within which the legislature has the flexibility to act in order to favor the policy of free exercise.

Id. at 932. Cf. Note, "Can the Government Require Accommodation of Religion at the Private Job-Site?" 62 Va. L. Rev. 237 (1976); Comment, "Title VII and Religious Discrimination: Is Any Accommodation Reasonable under the Constitution?" 9 Loyola Univ. L.J. 413 (1978); Comment, "Religious Discrimination in Employment--The Undoing of Title VII's Reasonable Accommodation Standard," 44 Brooklyn L. Rev. 598 (1978). These three commentators argue that the statute is unconstitutional.

IV

DECISION OF THIS COURT

Upon consideration of the arguments and authorities presented by the parties, and after considerable research and contemplation, this court finds itself in agreement with the dissent in *Cummins* and the district courts' analyses in *Gavin* and *Yott*. Accordingly, the reasonable accommodation obligation of Title VII, contained in § 701(j), is hereby held to be unconstitutional as a violation of the Establishment Clause of the First Amendment to the United States Constitution.

Neutrality is the heart of the religion clauses of the First Amendment. The Supreme Court has steadfastly upheld Jefferson's injunction that the government must remain neutral in religious affairs with the First Amendment standing as "a wall of separation between Church and State." *Everson v. Board of Education*, 330 U.S. 1, 16 (1947); *McCollum v. Board of Education*, 333 U.S. 203, 211 (1948). As stated by Judge Celebrezze in *Cummins*, "by 42 U.S.C. § 2000e(j), the Federal Government has breached the wall." 516 F.2d at 555.

It is, of course, fundamental that the First Amendment protects the free exercise of all religions; hence, the government may not place an "undue burden" on any religious free exercise without showing a "compelling state interest." But the fact that government may not penalize particular religions does not mean that Congress may favor particular religions does not mean that Congress may favor particular religions. "The Free Exercise Clause . . . does not offer a sword to cut through the strictures of the Establishment Clause." *Cummins, supra*, 516 F.2d at 557 (Celebrezze, dissent). Congress did not have to enact § 701(j) to prevent Free Exercise Clause abuses. The EEOC Regulation and § 701(j) responded merely to alleged private discrimination in employment. In the absence of the regulation, then, there would be no state action and, consequently, no free exercise problem. The tension between the Free Exercise and Establishment Clauses is not present in this case.[17]

In essence, the accommodation provision mandates religious discrimination. It requires an overt preference for the religious beliefs of certain employeese and dictates that an employer must go out of his way to accommodate minority beliefs, even if such accommodation is detrimental to other employees. As such, its operation runs directly contrary to the avowed purpose of Title VII.

The true purpose of the accommodation provision is clearly evident in the remarks of Senator Randolph, who authored the 1972 amendment. Senator Randolph stated that his purpose in sponsoring the amendment was to assure increased religious attendance by those whose religious beliefs prohibited work on certain days. Randolph made no mention of any business necessity or benefit to the general public. No clearly secular legislative purpose is manifested. The intent was unequivocal when he stated:

> [T]here has been a partial refusal at times on the part of employers to hire or continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire [*sic*] on particular days. So there has been a dwindling of membership of some religious organizations because of the situation.
>
> My own pastor in this area, Rev. Delmer Van Horn, has expressed his concern and distress that there are certain faiths that are having a very difficult time, especially with younger people, and understandably so, with reference of a possible inability of employers on some occasions to adjust work schedules to fit the requirements of the faiths of some of their workers.

118 Cong. Rec. 705 (1972). These remarks apparently served as the compelling impetus for the amendment.[18]

---

[17] *See, generally*, Note, "Can the Government Require Accommodation of Religion at the Private Job-Site?" 62 Va. L. Rev. 237, 244-246 (1976).

[18] *See, generally*, Comment, "Title VII and Religious Discrimination: Is Any Accommodation Reasonable under the Constitution?" 9 Loyola Univ. L. J. 413, 423-424 (1978).

The primary effect of religious preference, as sought by Senator Randolph, is a preconceived and direct benefit to particular religions. The accommodation requirement discriminates between religion and nonreligion by favoring only those employees with "religious" beliefs. In addition, the requirement discriminates among religions by favoring only those beliefs which require modification of an employer's work rules. As such it fails the second test of *Nyquist* in that it does not have "a primary effect that neither advances nor inhibits religion."

Finally, the enforcement of § 701(j) would result in an impermissible government entanglement with religion. As the Supreme Court stated in *Walz v. Tax Commission*, 397 U.S. 664 (1970) which concerned a property tax exemption for religious institutions:

> The test is inescapably one of degree. . . . In analyzing [the statute involved] the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement.

Id. at 674-675. Under Title VII, an individual may take a grievance to the EEOC and also may file a court action. To determine whether a reasonable accommodation is necessary, these adjudicatory bodies must not only review the work schedules allegedly disfavoring particular religions, but also must inquire into the sincerity of the religious beliefs involved and the validity of the religious nature of the claim. These are not easy questions and the search for answers will surely involve the courts in internal church disputes or matters of religious doctrine. Religion would have to be defined and its proper exercise delineated. This process would be difficult and time-consuming,[12] with the adjudications subject to review and remand and revision. The procedural history of the cases cited in this memorandum, with repeated appeal and remand, manifest a reluctance to deal with this problem. When the courts do attempt to tackle the merits of a claim of religious belief, the results are often confusing, inconsistent and evasive.

---

[19] For a discussion of the problems involved in such a process of definition *see* Edwards and Kaplan, "Religious Discrimination and the Role of Arbitration under Title VII," 69 Mich. L. Rev. 599, 614-619 (1971).

Because of the potential for recurring litigation before courts and government agencies concerning difficult questions of the exercise of religious beliefs, the reasonable accommodation clause of Title VII causes excessive government entanglement with religion.

It is realized that the court in declaring the accommodation requirement unconstitutional may cause David Anderson to suffer adverse consequences. However, the greater puposes, of Title VII, ensuring equal treatment in employment to all persons, and of the Establishment Clause, requiring government neutrality, lead inescapably to the conclusion of unconstitutionality.

This court concurs in the wisdom of Judge Learned Hand, expressed in *Otten v. Baltimore & O.R. Co.*, 205 F.2d 58, 61 (2nd Cir. 1953):

> The First Amendment protects one against action by the government, . . . but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities . . . We must accommodate our idiosyncracies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations for a better world.

Accordingly, it is the decision of this court that defendants are entitled to judgment as a matter of law and their Motions for Summary Judgment are hereby GRANTED.[20]

DATED: May 2, 1980.

EDWARD J. SCHWARTZ, Chief Judge
United States District Court

Copies to all parties.

---

[20] Because of the within holding of unconstitutionality, it is unnecessary to reach the issue of attorneys fees.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

June 4, 1979

Douglas F. Olins, Esq.
Olins & Foerster
2718 Fifth Avenue
San Diego, CA 92103

RE: International Association of Machinists
and Aerospace Workers, AFL-CIO, etc.
v. David Anderson
No. 78-1650

Dear Mr. Olins:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied. Mr. Justice Brennan and Mr. Justice White would grant certiorari.

Very truly yours,

Michael Rodak, Jr., Clerk

Michael Rodak, Jr.

RECEIVED SEP 11 1978

FILED
SEP 7 - 1978
EMIL E. MELFI JR.
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID ANDERSON,

Plaintiff-Appellant,

v.

GENERAL DYNAMICS CONVAIR AEROSPACE DIVISION, a corporation, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, SILVERGATE DISTRICT LODGE 50, an association,

Defendants-Appellees.

No. 77-2180

OPINION

Appeal from the United States District Court
for the Southern District of California

Before: HUFSTEDLER and GOODWIN, Circuit Judges, and LUCAS,* District Judge

HUFSTEDLER, Circuit Judge:

Anderson, a former employee of General Dynamics Convair Aerospace Division ("General Dynamics") brought this Title VII action against General Dynamics and the International Association of Machinists and Aerospace Workers, AFL-CIO, Silvergate District Lodge 50 ("Union"), claiming that he had been discharged in violation of the religious discrimination provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a) and 42 U.S.C. § 2000e(j)). He sought reinstatement of employment and benefits, an injunction restraining the Union from discriminating against him, back pay and allowances, reasonable attorney's fees, costs and interest. The district court held that no accommodation to Anderson's religious beliefs was possible because his offer to contribute the amount of Union dues to a charity of his choice, rather than to the Union or charities of the Union's choice, imposed an undue hardship on the Union. (*Anderson v. General Dynamics Convair Aerospace Division* (C.D. Cal. 1977) 430 F. Supp. 418.)

---

*Honorable Malcolm M. Lucas, United States District Judge, Central District of California, sitting by designation.

The critical issue on appeal is whether the Union carried its burden of proving that it could not reasonably accommodate Anderson's religious convictions without undue hardship on the Union. We conclude that it did not carry its burden of proof.

Anderson was first employed by General Dynamics on October 11, 1956. In 1959, he became a member of the Seventh Day Adventist Church. A tenet of the Church is that its members should not belong to or contribute to labor organizations. Anderson has at all material times held a sincere belief in that tenet. From 1959 until April 3, 1972, the collective bargaining agreement between General Dynamics and the Union did not require General Dynamics to employ only persons who were union members. On April 3, 1972, however, the Union and General Dynamics entered into a collective bargaining agreement, which contained the following provision:

> "Any employee on the Company's active payroll who is in the bargaining unit and is not a member of the Union on 3 April, 1972, shall, as a condition of continued employment in the bargaining unit, join the Union within ten (10) days after the thirtieth (30th) day following the effective date of this agreement, and shall maintain his membership as provided in Paragraph A above."

Anderson did not join the Union within the time limitation provided by the security clause of the bargaining agreement. On May 25, 1972, the Union notified Anderson of his delinquency under the agreement. On June 12, 1972, Anderson informed General Dynamics, which, in turn, informed the Union, that his religious beliefs prohibited him from joining the Union. Two days later, the Union requested that Anderson be discharged for failure to abide by teh provisions of the security clause. On June 16, 1972, General Dynamics discharged Anderson from his employment for the sole reason that he refused to become a member of or contribute to the Union.

The parties stipulated that neither the Union nor General Dynamics offered Anderson any specific alternatives or accommodations with respect to joining the Union, and both the Union and General Dynamics told Anderson that he had to follow the collective bargaining and join the Union. The parties also stipulated that Anderson had made known to his fellow workers, including his shop committeeman, that he would not join the Union and that he would not contribute to the Union, unless he could insure that his contributions went to a recognized charity.

Anderson promptly filed a complaint with the Equal Employment Opportunity Commission, which deferred the matter to the California Fair Employment Practice Commission ("FEPC"). The FEPC referred the case back to the EEOC. After finding reasonable cause to believe that Anderson's discrimination charge was well-founded, the EEOC attempted conciliation. When conciliation failed, EEOC issued a right to sue letter on October 5, 1975. Anderson timely filed a complaint in the district court. The district court rendered judgment against him, and he appeals.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) provides in pertinent part as follows:

> "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin. . . ."

Similar conduct by a labor organization is also proscribed by the Act. (42 U.S.C. § 2000e-2(c).)[1]

In 1972, Congress enacted 42 U.S.C. § 2000e(j), incorporating the substance of teh 1967 EEOC guidelines (29 C.F.R. § 1605.1). The section provides:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

As the Supreme Court has explained, in *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 74: "The intent and effect of this definition was to make it an unlawful employment practice under § 703(a)(1) for an employer [and also for a union] not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees."

---

[1] Section 2000e-2(c) provides as follows:

"It shall be an unlawful employment practice for a labor organization–

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

Neither Congress nor the EEOC has attempted to spell out any precise guidelines for determining when the "reasonable accommodations" requirement has been met, nor the kinds of circumstances under which a particular accommodation may cause hardship that is "undue." These decisions must be made in the particular factual context of each case because the decision ultimately turns on the reasonableness of the conduct of the parties under the circumstances of each case. (*Redmond v. GAF Corp.* (7th Cir. 1978) 574 F.2d 897, 902-03; *Williams v. Southern Union Gas Co.* (10th Cir. 1976) 529 F.2d 483, 489. *Cf. Trans World Airlines, Inc. v. Hardison, supra,* 432 U.S. at 74-75.)

We, as well as other courts, have recognized that there is both tension and conflict between the legitimate interests of the Union in preserving the benefits of union security agreements, which are valid under the National Labor Relations Act (29 U.S.C. § 158), and the accommodation requirements of Title VII (*e.g., Yott v. North American Rockwell Corporation* (9th Cir. 1974) 501 F.2d 398; *McDaniel v. Essex Intern'l, Inc.* (6th Cir. 1978) 571 F.2d 338; *Cooper v. General Dynamics, Convair Aerospace Division* (5th Cir. 1976) 533 F.2d 163, 166-69). The balance has been struck, however, in favor of the elimination of discrimination in employment practices and requiring accommodation of religious practices absent proof by the Union, the employer, or both, that reasonable accommodation cannot be made without an undue hardship to the Union or to the employer. (*Trans World Airlines, Inc. v. Hardison, supra,* 432 U.S. 63; *McDonald v. Santa Fe Trail Transportation Co.* (1976) 427 U.S. 273; *Franks v. Bowman Transportation Co.* (1976) 424 U.S. 747.)

To establish a prima facie case of discrimination under §§2000e-2(a)(1) and (j) Anderson had the burden of pleading and proving that (1) he had a bona fide belief that union membership and the payment of union dues are contrary to his religious faith;[2] (2) he informed his employer and the Union about his religious views that were in conflict with the Union security agreement, and (3) he was discharged for his refusal to join the Union and to pay union dues. (*E.g., Yott v. North American Rockwell Corp., surpa*, 501 F.2d 398; *Redmond v. GAF Corp., supra*, 574 F.2d at 901.)[3] Both by stipulations of fact and by evidence introduced at trial, Anderson established his prima facie case.

The burden was thereafter upon General Dynamics and the Union to prove that they made good faith efforts to accommodate Anderson's religious beliefs and, if those efforts were unsuccessful, to demonstrate that they were unable reasonably to accommodate his beliefs without undue hardship. *Id.* at 902.

---

[2] We have no occasion in this case to determine the breadth of the "beliefs" or "practices" protected by section 2000e(j) or to grapple with bona fides of a particular employee's religious convictions. Both of these facts are conceded for the purpose of this case. We are aware, however, of the Supreme Court's admonition in Fowler v. Rhode Island (1953) 345 U.S. 67, 70 that "it is no business of courts to say . . . what is a religious practice or activity. . . ." *See also* Redmond v. GAF Corp., *supra*, 574 F.2d at 900.

[3] We agree with the Seventh Circuit that the employee who has provided his employer with sufficient information to put it on notice of his religious needs is not required, as part of his prima facie case, to show that he thereafter made some efforts either to compromise or accommodate his own religious beliefs before he can seek an accommodatin from his employer. (Redmond v. GAF Corp., *supra*, 574 F.2d at 901-02 ("While we feel plaintiff should be free, even encouraged, to suggest to his employer possible ways of accommodating his religious needs, we see nothing in the statute to support the position that this is part of plaintiff's burden of proof." *Id.* at 901.)

Neither the Union nor General Dynamics did anything to accommodate Anderson's religious beliefs. They contend that their failure to take any steps to accommodate is excused because Anderson insisted on making an equivalent payment to a charity of his choice, rather than paying the equivalent fund to the Union for charitable purposes. They rely heavily upon the district court's finding that Anderson's refusal to pay his charitable contribution to the Union was based on his general distrust of unions, rather than on religious beliefs. Finally, they argue that Anderson's suggestion of accommodation would work undue hardship as a matter of law because Anderson would become a "free rider."

The burden was upon the appellees, not Anderson, to undertake initial steps toward accommodation. They cannot excuse their failure to accommodate by pointing to deficiencies, if any there were, in Anderson's suggested accommodation. Thus, Anderson's motivation in selecting his own charity is irrelevant. Moreover, the district court's finding is contrary to the parties' stipulation of fact that teachings of Anderson's Church forbade making contributions to unions.

Appellees are left with the argument that Anderson's refusal to pay either his union dues or the equivalent of union dues to the Union for a charity of the Union's choice would be an undue hardship as a matter of law because the means of accommodation would create "free riders." The district court accepted this argument; we do not. We follow the Sixth Circuit in *McDaniel v. Essex International, Inc., supra,* 571 F.2d 338, with which our case is almost identical.

McDaniel was a Seventh Day Adventist who had a bona fide religious belief that membership in the union and the payment of union dues was a violation of her religion. She requested her employer and the union to make an accommodation to her religious beliefs, and she suggested that she would be willing to contribute an amount equal to the union dues to a non-sectarian charity to be chosen by the union and her employer. Neither responded to her request, and she was discharged for her failure to adhere to the requirements of the union security agreement. The district court granted summary judgment in favor of the union and the employer, accepting their contentions that teh accommodation that the employee suggested would work an undue hardship on the union as a matter of law because non-payment of union dues adversely affected the "financial core" of the union and thus impaired its ability to fulfill its collective bargaining functions. The *McDaniel* court reversed. The court pointed out that the union security provisions of the Taft-Hartley Act (29 U.S.C. § 158(a)(3), (b)(2) (1970)) "do not relieve an employer or a union of the duty of attempting to make reasonable accommodation to the individual religious needs of employees. [citations omitted]. The burden is on Essex and IAM to make an effort at accommodation and, if unsuccessful, to demonstrate that they were uanble to reasonably accommodate the plaintiff's religious beliefs without undue hardship. The district court found that it would work an undue hardship on IAM to forego the dues payment by the plaintiff. There is no factual basis in the record for this conclusion. In *Draper v. U.S. Pipe & Foundry Co., supra* [(6th Cir. 1976) 527 F.2d 515], this court expressed its skepticism concerning 'hypothetical hardships' based on assumptions about accommodations which have never been put into practice. 527 F.2d at 520." (*Id.* at 343.)

Here, as in *McDaniel*, neither the Union nor the employer offered any evidence to prove that union members thought that a person was a free rider if he paid the equivalent of union dues to a charity, nor was there any evidence offered to prove as a fact that the accommodation of Anderson would otherwise have been an unduly difficult problem for the Union. It relied simply upon general sentiment against free riders.

Undue hardship means something greater than hardship. Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts. Even proof that employees would grumble about a particular accommodation is not enough to establish undue hardship. As the Supreme Court pointed out in *Franks v. Bowman*, *supra*, 424 U.S. at 775, *quoting United States v. Bethlehem Steel Corp.* (2d Cir. 1971) 446 F.2d 652, 663: "'If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.'"4/

We conclude that the Union and General Dynamics failed to carry their burden of proof, and, accordingly, the judgment must be reversed.5/ We also conclude that Anderson is entitled to a reasonable attorney's fee as part of his costs, pursuant to 42 U.S.C. § 2000e-5(k), the amount of which shall be fixed by the district court on remand.

Reversed and remanded for further proceedings consistent with the views herein expressed.

---

4. Appellees can take no comfort from the observation in Yott v. North American Rockwell Corp., *supra*, 501 F.2d at 403: "If appellees are able to demonstrate that any suggested accommodation would impose undue hardship on the Union or the employer's business, then Yott's discrimination claim should fail." We reversed in *Yott* because the appellees had not demonstrated that the suggested accommodation would impose undue hardship, and, as we have explained, the appellees in this case have not done so either.

5. The appellees attacked the constitutionality of the provisions of Title VII in issue in this case, and they renew that attack, at least obliquely, on appeal. The district court did not reach any constitutional issue, and under these circumstances we also decline to address any constitutional questions.

F[illegible] 1977
[illegible] CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID ANDERSON,
Plaintiff,
vs
GENERAL DYNAMICS CONVAIR AEROSPACE DIVISION, a Corporation, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, Silvergate District Lodge 50, An Association,
Defendants.

NO. 75-0857-S

MEMORANDUM

APPEARANCES: For Plaintiff - Kevin J. McInerney,
San Diego, California

For Defendant,
General Dynamics - Ward W. Waddell, Jr.
San Diego, California

For Defendant,
Union - Douglas F. Olins,
San Diego, California

DENNEY, District Judge[1]

This matter is before the Court for determination on the merits, subsequent to trial to the Court on February 2, 1977, and the submission of post-trial briefs. In accordance with Fed.R.Civ.P. 52(a), the Court makes the following findings of facts and conclusions of law.

---

[1] United States District Judge, District of Nebraska, sitting by designation.

I.

Plaintiff, David Anderson, instituted this action on October 3, 1975, pursuant to Title VII of the 1964 Civil Right Act, against General Dynamics Convair Aerospace Division [hereinafter referred to as General Dynamics] and Silvergate District Lodge 50, International Association of Machinists and Aerospace Workers, AFL-CIO [hereinafter referred to as the Union]. The court has jurisdiction under the provisions of 42 U.S.C. §2000e-5(f) et seq., as amended March 24, 1972, and 28 U.S.C. §1343(4).

This case involves the termination of plaintiff by General Dynamics pursuant to the request of the Union, for his failure to join or contribute to the Union. Plaintiff claims a violation of Title VII of the Civil Rights Act of 1964, as amended, based upon defendants' failure to accommodate his religious beliefs. Plaintiff seeks reinstatement of employment and benefits, an injunction restraining the Union from discriminating against him, back pay and allowances, reasonable attorney's fees, costs and interest.

Anderson was employed on a regular basis by defendant, General Dynamics, from October 11, 1956, until June 16, 1972. At the time of his termination, plaintiff was a process tank loader and tender.

Since 1959, Anderson has been a member of the Seventh Day Adventist Church. Between 1959 and April 3, 1972, the collective bargaining agreement between defendants did not require General Dynamics to employ only those persons who were members of the Union. On April 3, 1972, the Union entered into an employment contract on behalf of represented employees with General Dynamics. Article 9, Paragraph B of the Agreement, provided as follows:

> Any employee on the company's active payroll who is in the bargaining unit and is not a member of the Union on 3 April, 1972, shall, as a condition of continued employment in the bargaining unit, join the Union within ten (10) days after the thirtieth

> (30th) day following the effective date of this agreement, and shall maintain his membership as provided in Paragraph A above.

It is a tenet and principle of the Seventh Day Adventist Church, that its church members should not belong to any monopolistic business enterprise. Although the decision not to join or support a labor organization is left to the individual church member, Anderson has at all material times adhered to the conviction that joining or contributing to a labor union violates the principles and tenets of the Church. Anderson therefore did not join the Union within the time prescribed by the Union security clause.

On May 25, 2972, the Union notified plaintiff as to his delinquency relative to the requirements of the Union security provisions. Thereafter, on June 12, 1972, Anderson informed General Dynamics, who in turn informed the Union, that his religious beliefs prohibited him from joining the Union.[2] Two days later, the Union sent a letter to General Dynamics requesting that plaintiff be discharged for failure to join the Union. On or about June 14, 1972, upon receiving notice that he would be terminated unless he joined the Union, plaintiff again informed General Dynamics that his religious convictions would not allow him to join the Union. The parties have stipulated that neigher [*sic*] defendant "offered any specific alternatives or accommodations with respect to joining the Union. Mr. Anderson was informed by both defendants that he had to follow the collective bargaining agreement and join the Union."[3]

On September 27, 1972, Anderson filed a Charge of Discrimination against both defendants with the Equal Employment Opportunity Commission. On November 6, 1972, the Commission deferred the complaint to the California Fair Employment Practice Commission.

---

[2] Exhibit D-1.

[3] Pre-trial conference Order §2, para. 21.

The matter was referred back to the Commission on December 6, 1972, and on April 12, 1974, decision was entered finding reasonable cause to believe that plaintiff's charge of discrimination was true and that plaintiff was entitled to relief. On July 15, 1975, the Commission notified plaintiff that conciliation efforts had failed and a "Notice of Right to Sue Within 90 days" was received by plaintiff on October 14, 1975.

II.

The principal issue before the Court is whether the defendants could have accommodated plaintiff's religious beliefs without undue hardship on their businesses.[4]

At the outset, it should be noted that Congress has sanctioned union security agreements as an integral part of our labor relations policy. The National Labor Relations Act, as amended by Section 8(a)(3) of the Labor Management Relations Act (Taft Hartley Act), 29 U.S.C. §158(a)(3), provides in relevant part:

> [N]othing in this subchapter . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such

---

[4] Although both defendants have raised in their answers several legal defenses as a bar to plaintiff's action, the Court deems such defenses abandoned for failure to brief the issues pursuant to the Local Rules of the Southern District of California.

[5] Although plaintiff argued in his pre-trial brief that Section 8(a)(3) sanctions only agency shops and not union shops, this contention was withdrawn at pre-trial conference. The parties have agreed that the union security clause is valid and consistent with Section 8(a)(3) of the NLRA in that union membership is not a condition for acquiring employment, but merely a condition of continued employment. (Pre-trial Conference Order §III, para. 13). *See N.L.R.B. v. General Motors Corp.*, 373 U.S. 734 (1963).

42 U.S.C. §2000e-2(a) provides in part as follows:

> It shall be an unlawful employment practice for an employer–
>
> (1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; . . . .

42 U.S.C. §2000e-2(c) provides in relevant part as follows:

> It shall be an unlawful employment practice for a labor organization–
>
> . . . .
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this Section.

In 1972, Congress enacted 42 U.S.C. §2000e(j) which incorporated the substance of the 1967 E.E.O.C. guidelines found at 29 C.F.R. §1605.1:-

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Although Section 8(a)(3) of the NLRA and Title VII collide in cases such as presented herein, the Ninth Circuit has held that when a union security clause conflicts with freedom of religion, reasonable accommodation is required. *Yott v. North American Rockwell Corp.*, 501 F.2d 398, 402 (9th Cir. 1974). This Court is therefore squarely presented with the difficult task of balancing the rights and interests of the parties.

Defendants initially argue that plaintiff has failed to meet his burden of proof, inasmuch as he did not offer General Dynamics any suggested accommodation prior to termination. Although defendants correctly state that Judge Manuel Real placed the burden of initiating accommodations discussions with the employee in *Yott v. North American Rockwell*, ___ F.Supp. ___ (C.D. Calif. 1977) (on remand), the Ninth Circuit specifically held in *Yott* that "if a reasonable accommodation can be reached between the parties, it must be offered appellant Yott. . . ." 501 F.2d at 402, n. 6. On the other hand, plaintiff argues that he is entitled to judgment as a matter of law, since it is stipulated that neither defendant tendered plaintiff an offer of accommodation.[6]

The Court is impelled to reject the contentions of both parties. The controlling question does not turn on subtle procedures which require a party to come forward with an offer of accommodation prior to termination;[7] the touchstone of religious discrimination under the Act is whether a reasonable accommodation can, in fact, be reached between the parties without undue hardship. It would be anomolous to compel an employer and union to accommodate an employee's religious beliefs, regardless of hardship, simply because the employer failed to offer the employee any accommodations prior to his termination, regardless of whether, in fact, a reasonable accommodation is available. This result would not only be contrary to logic, but in direct conflict with the statutory command which exonerates "an employer who demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. §2000e(j).

---

[6] The Eighth Circuit held in *Hardison v. TransWorld Airlines, Inc.*, 527 F.2d 33, 39 (8th Cir. 1975) *cert. granted* ___ U.S. ___ (1976), "[b]efore an employer can assert the defense of non-cooperation, it is incumbent upon it to establish the accommodation which it has tendered and with which the employee refused to cooperate."

[7] A common sense interpretation of the Act dictates a conclusion that the employer is required to initiate a conference with employee prior to termination to discuss possible accommodation to the employee's religious beliefs. An acceptance of defendants' position would defeat the conciliation powers of the Commission. *See* 29 C.F.R. §1601.22.

The parties have stipulated that Anderson "had made known to his fellow workers, including his shop committeeman, the fact that he would not join and/or support the Union except if he could insure that his contributions went to a recognized charity[7] that met with his approval.[8] Plaintiff testified that he told the Union committeeman, Joe Mattson, prior to his termination that he did not mind paying the equivalent of Union dues if he could give it directly to a charity. Plaintiff further stated that he would not make payments for a charity to the Union because he doesn't trust unions. The following statement from Anderson's deposition is particularly relevant:

> Anyhow, the committeeman told me, "what about, you know, paying union"–not paying union dues, less so much of my money be taken out of my check and go to charity. And I told him the same thing I'm telling you now, that they tells you that but they don't do that. So I told him, "I don't mind paying the union dues or paying the fee in the same amount, but I would not, you know, let the union do it.[9]

In *Yott v. North American Rockwell Corporation, supra*, the Ninth Circuit reversed the dismissal of plaintiff's complaint and remanded the case to the district court for a determination of whether a reasonable accommodation without undue hardship could be reached. In a footnote, the court described the remand:

> [W]e leave analysis of whether the "business necessity" test would be met for the District Court's determination. We are certain that the court will keep in mind that the purpose of a union security clause is to insure that all who receive the benefits of the collective bargaining agreement pay their fair share. "Free riders" are discouraged. In effect, stability is promoted by reducing potential labor

---

[8] Pre-trial Conference Order, §III, para. 25.

[9] Deposition III:20-26.

FE[illegible] 1977

FILED
ENTERED
LODGED
RECEIVED
FEB 17 1977
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID ANDERSON,

Plaintiff,

vs

GENERAL DYNAMICS CONVAIR AEROSPACE DIVISION, a Corporation, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, Silvergate District Lodge 50, An Association,

Defendants.

NO. 75-0857-S

JUDGMENT

In accordance with the Memorandum Opinion filed contemporaneously herewith,

IT IS HEREBY ORDERED that judgment be entered for defendants, each party to pay their own costs.

IT IS FURTHER ORDERED that the motion of defendant, International Association of Machinists and Aerospace Workers, AFL-CIO, Silvergate District Lodge 50, An Association, for summary judgment is denied as moot.

Dated this 15th day of February, 1977.

BY THE COURT

Robert V. Denney
United States District Judge

TOOLEY v. MARTIN-MARIETTA CORP.

Herman O. TOOLEY, Edward J. Helt and Arnold G. Bakke, Plaintiffs-Appellees,

v.

MARTIN-MARIETTA CORPORATION, a corporation; and United Steel Workers of America, Local 8141, Defendants-Appellants.

No. 80-3029.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 15, 1981.

Decided June 22, 1981.

Seventh-Day Adventists brought action under Civil Rights Act for relief from religious discrimination by their employer, their local union, and national union. The United States District Court for the District of Oregon, Gus J. Solomon, J., enjoined union and company from attempting to discharge plaintiffs for failing to pay union dues so long as they made equivalent contributions to mutually acceptable charity, and company and local union appealed. The Court of Appeals, Farris, Circuit Judge, held that: (1) accommodation requested by Seventh-Day Adventists was reasonable; (2) district court's conclusion that accommodation did not work undue harship on union was not clearly erroneous; and (3) section of Civil Rights Act, by authorizing accommodation, did not violate establishment clause.

Affirmed.

1. Civil Rights 9.11

Accommodation requested by Seventh-Day Adventists whereby they would pay amount equal to union dues to mutually acceptable charity was a reasonable accommodation, under Civil Rights Act, of "union shop" agreement between union and company, and tenets of Adventists' faith prohibiting them from becoming members in or paying service fee to union. Civil Rights Act of 1964, § 701(j), 42 U.S.C.A. § 2000e(j); National Labor Relations Act, § 19 as amended 29 U.S.C.A. § 169.

2. Civil Rights 13.13(3)

Claim of undue hardship in accommodating religious beliefs cannot be supported by merely conceivable or hypothetical hardships; instead it must be supported by proof of actual imposition on co-workers or disruption of work routine, and magnitude as well as fact of hardship must be determined by examination of facts of each case. Civil Rights Act of 1964, § 701(j), 42 U.S.C.A. § 2000e(j).

3. Civil Rights 9.11

Widespread refusal to pay union dues is sufficient to establish undue hardship in accommodating religious beliefs. Civil Rights Act of 1964, § 701(j), 42 U.S.C.A. § *2000e(j).*

4. Federal Courts 858

District court's conclusion that accommodation whereby Seventh-Day Adventists would pay amount equal to union dues to mutually acceptable charity did not work undue hardship on union was not clearly erroneous. Civil Rights Act of 1964, § 701(j), 42 U.S.C.A. § 2000e(j).

5. Civil Rights 2.1

Constitutional Law 84

Section of Civil Rights Act, by authorizing accommodation whereby Seventh-Day Adventists would pay amount equal to union dues to mutually acceptable charity, did not violate establishment clause. Civil Rights Act of 1964, § 701(j), 42 U.S.C.A. § 2000e(j); U.S.C.A.Const. Amend. 1.

6. Constitutional Law 84

Establishment clause ensures government neutrality in matters of religion. U.S.C.A.Const. Amend. 1.

7. Constitutional Law 84

While government must avoid partiality to any one group, it may deviate from absolute rigidity to accommodate religious practices of each group. U.S.C.A.Const. Amend. 1.

8. Constitutional Law 84

Government may legitimately enforce accommodations of religious beliefs when accommodation reflects obligation of neutrality in face of religious differences and does not constitute sponsorship, financial support or active involvement of sovereign and religious activities with which establishment clause is mainly concerned. U.S.C.A.Const. Amend. 1.

Appeal from the United States District Court for the District of Oregon.

Before HUG, TANG and FARRIS, Circuit Judges.

FARRIS, Circuit Judge:

The United Steelworkers of America, Local 8141, appeal the decision and order of the district court, enjoining the Steelworkers and the Martin-Marietta Corporation from attempting to discharge the plaintiffs for their nonpayment of union dues. We affirm.

FACTS

In 1976, the Martin-Marietta Corporation and Steelworkers Local 8141 executed a collective bargaining agreement containing a "union shop" clause, under which the company was obligated to discharge all employees who failed to join the union. Plaintiffs Tooley, Bakke, and Helt are Seventh Day Adventists who, under the tenets of their faith, are prohibited from becoming members in or paying a service fee to a union. Plaintiffs informed the company and the union of this proscription, and offered to pay an amount equal to union dues to a mutually acceptable charity. The union refused.

After exhausting their administrative remedies, plaintiffs instituted this action, alleging that the union's and the company's refusal to honor the requested accommodation constituted religious discrimination under Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e-2(a), 2000e-2(c) (1976). In particular, the plaintiffs argued that both the union and the company were required under section 701(j) of the Act, 42 U.S.C. 2000e(j) (1976), to make good faith efforts to institute their requested exemption unless it would result in undue hardship to either the Steelworkers or the company. The Steelworkers contended that the "substituted charity" accommodation was unreasonable, that its implementation would cause the union undue hardship, and that by authorizing such an accommodation, section 701(j) violated the Establishment Clause. The district court enjoined the union and the company from attempting to discharge the plaintiffs for failing to pay union dues so long as they make equivalent contributions to a mutually acceptable charity. *Tooley v. Martin-Marietta Corp.*, 476 F.Supp. 1027 (D.Or. 1979).[1]

DISCUSSION

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a) and 2000e-2(c) (1976), provides that it is an unlawful employment practice for either an employer or a union to discriminate against an individual because of that individual's "religion." Section 701(j) of the Act, 42 U.S.C. 2000e(j) (1976), defines "religion" to include all aspects of religious observance, "unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." Although this definition is framed in terms of the employer's ability to accommodate, we have held that the duty imposed by section 701(j) applies equally to unions. *Yott v. North American Rockwell Corp.* (*Yott II*), 602 F.2d 904, 909 (9th Cir. 1979), *cert. denied*, 445 U.S. 928, 100 S.Ct. 1316, 63 L.Ed.2d 761 (1980).

We have previously considered, in four separate opinions, the applicability of Title VII's religious discrimination provisions to fact situations involving religious objectors to mandatory union dues. *Yott II*; *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d 397 (9th Cir. 1978), *cert. denied*, 442 U.S. 921, 99 S.Ct. 2848, 61 L.Ed.2d 290 (1979); *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403 (9th Cir. 1978), *cert. denied*, 439 U.s. 1072, 99 S.Ct. 843, 59 L.Ed.2d 38 (1979); *Yott v. North American Rockwell Corp.*(*Yott I*), 501 F.2d 398 (9th Cir. 1974). In each case, we supplied guidelines for determining the scope of both the "reasonable" accommodation requirement and the "undue" hardship limitation imposed by section 701(j) in factual settings nearly identical to that presented here.

I. REASONABLENESS OF THE SUBSTITUTED CHARITY ACCOMMODATIONS

The Steelworkers do not deny that the plaintiffs established a prima facie case of discrimination under Title VII. The burden was thereafter on the Steelworkers to establish that they reasonably accommodated the plaintiffs' religious beliefs. *Anderson*, 589 F.2d at 401. The Steelworkers argue, however, that they were not required to make any effort to accommodate the plaintiffs' religious beliefs because the requested accommodation was inherently "unreasonable."

---

[1] The parties have agreed to maintain an amount equal to the dues owned by the plaintiffs to the union in a deposit account pending the disposition of this case.

[1] The Steelworkers first contend that the substituted charity accommodation is unreasonable because it is plainly inconsistent with the broad and unqualified national labor policy of promoting union shop agreements between union and employer. *See* 29 U.S.C. § 158(a)(3) (1976). We have previously acknowledged the apparent "tension and conflict" between the union's interest in obtaining the benefits of a union shop agreement, authorized by the NLRA, and the interests of religious employees in avoiding the burdens and evils associated with employment discrimination, prohibited by Title VII. *Anderson*, 589 F.2d at 400. We observed, however, that section 701(j) effects a balance between these interests by requiring *reasonable* accommodation of the employee's religious beliefs by the union or the employer in the absence of resulting *undue* hardship to either. *Id.* at 400-01; *accord, McDaniel* v. *Essex International, Inc.*, 571 F.2d 338, 343 (6th Cir. 1978); *Cooper v. General Dynamics, Convair Aerospace Division*, 533 F.2d 163, 169-70 (5th Cir. 1976), *cert. denied*, 433 U.s. 908, 97 S.Ct. 2972, 53 L.Ed.2d 1091 (1977). The substituted charity accommodation is consistent with the balancing of interests promoted by section 701(j). Under this accommodation, the union is entitled to enjoy the benefits of the union shop agreement while the plaintiffs are entitled to practice in accordance with their religious convictions. To the extent that the substituted charity accommodation effects this balance, it is reasonable under section 701(j).

Our conclusion is consistent with recent additions to the NLRA. Congress has amended section 19 of the NLRA to require an accommodation virtually identical to that requested by the plaintiffs.[2] *See* Act of

---

[2] Section 19 of the NLRA now provides:

> Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employees' employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligous, nonlabor organization charitable fund exempt from taxation under section 501(c)(3) of title 26 of the Internal Revenue Code, chosen by such employee from a list of at least three such funds, designated in such contract or if the contract fails to designate such funds, then to any such fund chosen by the employee. If such employee who holds conscientious objections pursuant to this section requests the labor organization to use the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employer for the reasonable cost of using such procedure.

Dec. 24, 1980, Pub.L. No. 96-593, 94 Stat. 3452. The legislative history to that amendment (1) recognizes that the substituted charity accommodation effects a reasonable reconciliation between section 8(a)(3) of the NLRA and Title VII, and otherwise constitutes a reasonable accommodation under section 701(j)[3] and (2) establishes that the accommodation does not interfere with the employer's or union's right to execute union shop agreements, which are still authorized under section 8(a)(3).[4]

Alternatively, the Steelworkers argue that exempting the plaintiffs from mandatory union dues is unreasonable because it results in impermissible unequal treatment. Disparate treatment of employees, however, is not necessarily unreasonable. *See Brown v. General Motors Corp.*, 601 F.2d 956, 961-62 (8th Cir. 1979). The religious accommodation provisions do not authorize *preferential* treatment of employees. They do not require an employer or union to deny the express contractual rights of some employees or to incur substantial costs of accommodation for the benefit of those to be accommodated. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, at 81, 84, 97 S.Ct. 2264, at 2275, 2276, 53 L.Ed.2d 113 (1977). The substituted charity accommodation does not result in preferential treatment between employees. The plaintiffs suffer the same economic loss as the union member employees. The accommodation is reasonable.[5]

II. HARDSHIP FROM THE SUBSTITUTED CHARITY ACCOMMODATION

The Steelworkers argue that the substituted charity accommodation works an undue hardship on the union by depriving it of funds necessary for the union's support. The district court noted that the Steelworkers' surplus reserves for the last three years, even after charitable contributions, exceeded the dues lost by accommodating as many as six employees.[6] Consequently, the district court held that since the "likelihood" of hardship to the union would be "remote," the Steelworkers had failed to establish "undue" hardship. 476 F.Supp. at 1030-31.

---

[3] 126 Cong.Rec. H760 (daily ed. Feb. 11, 1980) (remarks of Rep. Thompson); 126 Cong.Rec. H763 (daily ed. Feb. 11, 1980) (remarks of Rep. Duncan).

[4] 126 Cong.Rec. H764 (daily ed. Feb. 11, 1980) (remarks of Rep. Erlenborn).

[5] Section 19 of the NLRA, as amended by Act of Dec. 24, 1980, Pub.L. No. 96-593, 94 Stat. 3452, constitutes a sufficiently "clear and express indication from Congress" that any alleged unequal treatment between employees resulting from the "substituted charity" accommodation is permissible under Title VII. *Hardison*, 432 U.S. at 79, 97 S.Ct. at 2274, 2277.

The Steelworkers first contend that the standard used by the district court is inconsistent with that adopted by the *Hardison* Court, which held that "accommodation costs" that are greater than *de minimis* place an undue hardship on an employer, 432 U.S. at 84, 97 S.Ct. at 2276, and presumably a union. The Steelworkers contend that reference to the availability of surplus funds in the union's reserve is a departure from the *de minimis* standard.

[2] We have recognized that the *Hardison* standard applies to religious accommodations of the kind requested here. *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403, 406-07 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072, 99 S.Ct. 843, 59 L.Ed.2d 38 (1979). We have acknowledged, however, that the decision of whether a particular accommodation works an undue hardship on either an employer or union must be made by considering "the particular factual context of each case." *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d 397, 400 (9th Cir. 1978), *cert. denied*, 442 U.S. 921, 99 S.Ct. 2848, 61 L.Ed.2d 290 (1979). A claim of undue hardship cannot be supported by merely conceivable or hypothetical hardships; instead, it must be supported by proof of "actual imposition on co-workers or disruption of the work routine." *Id.* at 406-07. The *magnitude* as well as the *fact* of hardship must be determined by the examination of the facts of each case. The approach adopted by the district court is not inconsistent with these principles.[7]

[3, 4] The Steelworkers also contend that, even if the district court applied the correct standard to determine the magnitude of the accommodation cost, its conclusion was clearly erroneous. We disagree. A "widespread refusal to pay union dues" is sufficient to establish undue

---

[6] In addition to the plaintiffs, three other employees have requested similar accommodation.

[7] The approach is not inconsistent with that adopted in *Hardison*. In finding that the accommodation cost in *Hardison* was greater than *de minimis*, the Supreme Court considered factors unique to the particular facts of that case by considering the cost to the employer of implementing the accommodation, as well as the likelihood of other employees requesting similar accommodations. 432 U.S. at 84 n. 15, 97 S.Ct. at 2277, n. 15.

hardship, *Burns*, 589 f.2d at 407, but that is not the contention here. The Steelworkers have not established that the "substituted charity" accommodation, as applied here, will deprive the union of monies necessary for its maintenance or operation. The district court's conclusion is not clearly erroneous.

III. THE CONSTITUTIONALITY OF SECTION 701(j) OF TITLE VII

[5-7] The Steelworkers argue that section 701(j) as applied here violates the Establishment Clause.[8] The district court held that section 701(j) withstood cnstitutional attack under the three-pronged test enunciated in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 772-73, 93 S.Ct. 2955, 2965, 39 L.Ed.2d 948 (1973). *See also Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971). We agree. *Accord, Nottelson v. A. O. Smith Corp.*, 643 F.2d 445, 453-55 (7th Cir. 1981); *Burns v. Southern Pacific Transportation Co.*, 20 Empl.Prac. Dec. par. 30,184, at 11,977-78 (D.Ariz. 1979), *on remand from* 589 F.2d 403 (9th Cir. 1978). *Contra, Anderson v. General Dynamics Convair Aerospace Division*, 489 F.Supp. 782, 784-91 (S.D.Cal. 1980), *on remand from* 589 F.2d 397 (9th Cir. 1978); *Yott v. North American Rockwell Corp.*, 428 F.Supp. 763 (C.D.Cal. 1977), *aff'd on other grounds*, 602 F.2d 904 (9th Cir. 1979), *cert. denied*, 445 U.S. 928, 100 S.Ct. 1316, 63 L.Ed.2d 761 (1980). The Establishment Clause ensures government neutrality in matters of religion. *Gillette v. United States*, 401 U.S. 437, 449, 91 S.Ct. 828, 835, 28 L.Ed.2d 168 (1971). But government neutrality "is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation." *Sherbert v. Verner*, 374 U.S. 398, 422, 83 S.Ct. 1790, 1803, 10 L.Ed.2d 965 (1963) (Harlan, J., dissenting). Courts have

---

[8] The plaintiffs contend that the constitutional validity of § 701(j) as applied here has been determined conclusively by the Supreme Court's dismissal of the appeal in *Rankins v. Comm'n on Professional Competence*, 24 Cal.3d 167, 593 P.2d 852, 154 Cal.Rptr. 907, *appeal dismissed*, 444 U.S. 986, 100 S.Ct. 515, 62 L.Ed.2d 416 (1979). There, the California state constitutional employment discrimination provision, construed to require the same accommodations as those required by Title VII's § 701(j), was held not to offend the Establishment Clause in requiring a school district to accommodate a teacher who refused to work on religious holidays. The dismissal of the appeal in *Rankins* binds this court only on "the precise issues presented and necessarily decided." *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977). Because this case and *Rankins* involve entirely different kinds of religious accommodations, the constitutional dimension of each is necessarily different.

defined the government's obligation as one of "benevolent neutrality." *Walz v. Tax Commission*, 397 U.S. 664, 669, 90 S.Ct. 1409, 1411, 25 L.Ed.2d 697 (1970). While the government must avoid "partiality to any one group," *Zorach v. Clauson*, 343 U.S. 306, 313, 72 S.Ct. 679, 683, 96 L.Ed. 954 (1952), it may deviate from absolute rigidity to accommodate the religious practices of each group. *Walz*, 397 U.S. at 669, 90 S.Ct. at 1411.

[8] Government can accommodate the beliefs and practices of members of minority religions without contravening the prohibitions of the Establishment Clause. *Cf. Wisconsin v. Yoder*, 406 U.S. 205, 234 n.22, 92 S.Ct. 1526, 1542 n.22, 32 L.Ed.2d 15 (1972) (exempting Amish children from state compulsory education laws); *Sherbert v. Verner*, 374 U.s. 398, 409, 83 S.Ct. 1790, 1796, 10 L.Ed.2d 965 (1963) (exempting Seventh-Day Adventists from state unemployment requirements). Government may legitimately enforce accommodations of religious beliefs when the accommodation reflects the "obligation of neutrality in the face of religious differences," and does not constitute "sponsorship, financial support, [or] active involvement of the sovereign in religious activities" with which the Establishment Clause is mainly concerned. *Wisconsin v. Yoder*, 406 U.S. at 234, n.22, 92 S.Ct. at 1542 n.22; *Walz v. Tax Commission*, 397 U.S. at 668, 90 S.Ct. at 1411; *Sherbert v. Verner*, 374 U.S. at 409, 83 S.Ct. at 1796.

Like the accommodations allowed in *Sherbert v. Verner* and *Wisconsin v. Yoder*, the substituted charity accommodation satisfies these requirements. By exempting the plaintiffs from union membership or the payment of mandatory union dues, the accommodation places the plaintiffs on an equal footing with other employees whose religious convictions find no impediment in the workplace. To this extent, the accommodation reflects governmental neutrality in the face of religious differences. Further, the substituted charity accommodation does not involve government "sponsorship" or "financial support" of the Seventh-Day Adventist religion: the accommodation requires that the plaintiffs suffer the same economic loss as their co-workers who are not similarly restricted in paying union dues or in obtaining union membership. The accommodation demands neither direct nor indirect financial support of the plaintiffs' religion by the government, and cannot be reasonably cnstrued as actively advancing or assisting their religion.

This same conclusion is compelled under the test enunciated in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 772-73, 93 S.Ct. 2955, 2965, 39 L.Ed.2d 948 (1973). The

Nyquist test, typically applied to state legislation, requires that for section 701(j) to be consistent with the demands of the Establishment Clause, it must (1) reflect a clearly secular purpose, (2) have a primary effect that neither inhibits nor advances religion, and (3) avoid excessive government entanglement with religion.[9]

1. *Legislative Purpose*

The primary motivation for the enactment of section 701(j) was to resolve many of the issues left open by prior "Sabbatarian" cases, where employees refused to work on their Sabbath and requested that their employers accommodate them. *Hardison*, 432 U.S. at 73-74, 97 S.Ct. at 2271. The Steelworkers contend that because section 701(j) was intended to secure special treatment for Sabbatarians and other religious proponents, the legislation has an improper sectarian purpose.

Although section 701(j)'s enactment may have resolved certain problems confronting sectarians, this alone is insufficient to establish that the legislation lacks a clearly secular purpose. *McGowan v. Maryland*, 366 U.S. 420, 445, 81 S.Ct. 1101, 1115, 6 L.Ed.2d 393 (1961); *Stone v. Graham*, ___ U.S. ___, 101 S.Ct. 192, 195, 66 L.Ed.2d 199 (1980) (Rehnquist, J., dissenting). Section 701(j) was intended to promote Title VII's broader policy of prohibiting discrimination in employment. The bill's sponsor in the Senate, recognizing the problems confronting Sabbatarians in particular, stated that the legislation was intended to "assure that freedom from religious discrimination in the employment of workers is for all time guaranteed in law." 118 Cong.Rec. 705. Section 701(j) functions to "secure equal economic opportunity to members of minority religions."[10] *Hardison*, 432 U.S. at 90 n.4, 97 S.Ct. at 2280 n.4 (Marshall, J., dissenting). *Cf. Rankins v. Commission on Professional Competence*, 24 Cal.3d 167, 177-78, 593 P.2d 852, 859, 154 Cal.Rptr. 907, 913-14 (recognizing as secular the purpose of "promot[ing] equal employment opportunities for members of all religious faiths"), *appeal dismissed*, 444 U.S. 986, 100 S.Ct. 515, 62 L.Ed.2d 416 (1979). It therefore has a legitimate secular purpose.

---

[9] The Steelworkers' attack on § 701(j) as applied presents an apparent obstacle to application of the *Nyquist* test, as each element of the test normally requires an examination of the legislation as a whole. Because the "reasonable accommodation" and "undue hardship" provisions of § 701(j) operate uniquely in each case, the narrow attack on § 701(j) in this case is appropriate. Consequently, to the extent it is possible, we apply the *Nyquist* test to determine the legitimacy of § 701(j) as applied.

[10] The legislative history to § 19 of the NLRA, as amended by Act of Dec. 24, 1980, Pub.L. No. 96-593, 94 Stat. 3452, reflects this same broad ameliorative purpose. *See* 126 Cong.Rec. H763 (daily ed. Feb. 11, 1980) (remarks of Rep. Duncan).

2. *Primary Effect*

The Steelworkers contend that the substituted charity accommodation has the primary effect of advancing the plaintiffs' religion by conferring various alleged economic benefits. It is argued that as a consequence of the accommodation, the plaintiffs have a greater choice than their co-workers in determining how their money is spent, and are more easily able to make charitable contributions.

We reject this argument. It confuses ancillary or incidental benefits with primary benefits to those accommodated. It could be argued, for example, that the exemption allowed the Amish children in *Wisconsin v. Yoder* permitted the children to contribute additional economic benefit to their families, and that the exemption allowed in *Sherbert v. Verner* permitted the Seventh-Day Adventist to exercise a greater choice in determining which day of the week was to be free of employment responsibilities.

The substituted charity accommodation allows the plaintiffs to work without violating their religious beliefs, at a cost equivalent to that paid by their co-workers without similar beliefs. It neither increases nor decreases the advantages of membership in the Seventh-Day Adventist faith in a manner so substantial and direct that it "advances" or "inhibits" the plaintiffs' religion.

The Steelworkers also contend that the accommodation violates the Establishment Clause because it will ultimately result in either the union curtailing necessary services, or forcing the accommodation cost on other employees. In either case, the Steelworkers argue that the plaintiffs receive the benefit of their religious beliefs at the expense of their co-workers. As a result, it is urged that the accommodation impermissibly places the burdens of accommodation on unaccommodated private parties.

A religious accommodation does not violate the Establishment Clause merely because it can be construed in some abstract way as placing an inappreciable but inevitable burden on those not accommodated. Exemption of conscientious objectors from military conscription has been upheld despite the effect of requiring nonobjectors to serve in their stead. *Gillette v. United States*, 401 U.S. 437, 452 n.17, 91 S.Ct. 828, 838 n.17, 28 L.Ed.2d 168 (1971); *Selective Draft Law Cases*, 245 U.S. 366, 389-90, 38 S.Ct. 159, 165, 62 L.Ed. 349 (1918). Sectarian institutions are exempt from the payment of property taxes, even though the effect may be to increase marginally the property taxes paid by unaccommodated private citizens. *Walz v. Tax Commission*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970). Sunday closing laws have been upheld even though their effect may be to burden those who sincerely observe another Sabbath. *Gallagher v.*

Crown Kosher Super Market, 366 U.S. 617, 81 S.Ct. 1122, 6 L.Ed.2d 536 (1961); *Hardison*, 432 U.S. at 96 n.13, 97 S.Ct. at 2283 n.13 (Marshall, J., dissenting).

The substituted charity does not have a primary effect which either advances or inhibits the plaintiffs' religion.

3. *Government Entanglement*

Nor do we find that the accommodation here requires that the government become impermissibly entangled with the accommodation's administration. The Establishment Clause prohibits only *excessive* government entanglement. *Walz v. Tax Commission*, 397 U.S. 664, 674-75, 90 S.Ct. 1409, 1414, 25 L.Ed.2d 697 (1970). The implementation of the substituted charity accommodation requires a minimal amount of supervision and administrative cost. Once the sincerity of a religous objector's belief is established, the only administrative burden involves the employee and the union agreeing on a mutually acceptable charity. The Steelworkers have not demonstrated that the burden of administering this accommodation involves sufficiently significant amounts of time or money or that the government involvement is sufficiently "comprehensive, discriminating, and continuing" to draw into question the validity of the accommodation. *Lemon v. Kurtzman*, 403 U.S. 602, 619, 91 S.Ct. 2105, 2114, 29 L.Ed. 745 (1971).

Affirmed.

[Par. 31,757] Timothy O. Isaac, Plaintiff v. Butler's Shoe Corporation et al., Defendants.

United States District Court, Northern District of Georgia, Atlanta Division. Civil Action No. C80-1083A. December 19, 1980.

Title VII—Civil Rights Act of 1964

Duty to Accommodate Religious Needs—No-Beard Rule—Discharge.—The religious accommodation requirement of Title VII is unconstitutional because it causes excessive government entanglement with religion, but a discharged employee was entitled to challenge an employer's no-beard policy, under which he was fired for his religiously-motivated growing of a beard, on other grounds. The employee could possibly show that the no-beard policy had an excessive impact on persons who grow beards for religious reasons or by showing some disparate impact treatment concerning leave to attend a religious gathering. The beard rule might also have been discriminatorily enforced on racial or other grounds. Thirty days was granted to the claimant to amend his complaint.

Back reference.—Par. 238.155.

Suits by Private Individuals—Statute of Limitations—Disputed Isue.—The issue of whether or not a claimant filed his Title VII suit in a timely fashion, being disputed, was unsuitable for summary judgment and was to be resolved at trial.

Back reference.—Par. 2250.20.

Dress and Appearance of Employees—No-Beard Rule—Mutable Characteristic.—Summary dismissal of religious bias claims was denied with respect to a discharged employee's claim that termination of his employment under a no-beard policy after he grew a beard for religious reasons violated Title VII. Although discharge on the basis of other mutable characteristics has been permitted, there was no certainty that the claimant would not be entitled to recover under any state of facts that could be proved in support of his claims. His suit was therefore not to be dismissed for failure to state a claim.

Back reference.—Par. 451.35.

Court Procedures—Jury Trial.—A motion to strike a religious discrimination claimant's demand for a jury trial was granted where the claimant failed to oppose the motion.

Back reference.—Par. 2239.47.

Michael Weinstock, for Plaintiff.

Jeffrey B. Berg, Simon A. Miller, Alan M. Gerlach, Jr. (Arnall, Golden & Gregory), Atlanta, Georgia, for Defendants.

EDENFIELD, D.J.: This employment discrimination action, alleging violations by defendant Butler's Shoe Corporation (Butler's) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, and including a diversity claim against the four individual defendants for tortious interference with plaintiff's employment,[1] is before the court on defendant Butler's motions to dismiss or for summary judgment, Rule 12(b)(6), Fed.R.Civ.P., and to strike plaintiff's jury demand.

The facts, as they appear from the pleadings, indicate that plaintiff initially was employed by defendant Butler's in 1969. First employed as a shoe salesman, plaintiff later became a store manager, the position he held at the time his employment with Butler's ended on April 22, 1976.

Plaintiff claims that, in 1976, in conformity with his religious beliefs and his affiliation with the Church of God, it became necessary for him to grow a beard. He claims that at that time he brought the religious reasons for growing a beard to Butler's attention.

On March 4, 1976, plaintiff alleges, he requested from his supervisor a personal leave in order to attend a religious gathering in Kansas City, Missouri. Although the record contains no details, plaintiff apparently claims that he was "constructively discharged" as a result both of his growing a beard and his attendance at this religious gathering.

Defendant Butler's now moves to dismiss, or for summary judgment, on several grounds.

[Constitutionality of Accommodation Rule]

1. The first ground defendant advances in support of dismissal is that the reasonable accommodation provision contained in section 701(j) of Title VII, 42 U.S.C. § 2000e(j), is unconstitutional.

Forty-two U.S.C. § 2000e-2(a)(1) provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to . . . discharge any individual . . . because of such individual's . . . religion . . .

Forty-two U.S.C. § 2000e(j), added by Congress in the 1972 amendments to this title, defines religion as follows:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is

> unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

This subsection is commonly referred to as the "religious accommodation" provision of Title VII. It is a distillation of two similar regulations promulgated by the Equal Employment Opportunity Commission (EEOC) that were enacted in 1966 and 1967. 29 C.F.R. § 1605.1.

Defendant Butler's argues that this provision violates the establishment clause of the first amendment to the United States Constitution ("Congress shall make no law respecting an establishment of religion. . . ."). In support of its motion, Butler's cites a number of cases that have ruled upon the constitutionality of this religious accommodation provision.[2] In response, plaintiff cites several similar cases that have upheld the statute.[3] The positions taken by these opposing lines of cases are exemplified by two of them, one upholding the reasonable accommodation provision, the other striking it down.

In *Cummins v. Parker Seal Co.* [9 EPD par. 10,171], 516 F.2d 544 (6th Cir. 1975), plaintiff, a production scheduler, brought suit against his former employer claiming that he had been discharged in violation of Title VII because his religion prohibited him from working on Saturdays and certain other holy days. In particular, plaintiff alleged that his discharge violated 29 C.F.R. § 1605.1, the EEOC regulation that was the forerunner of, and essentially identical to, 42 U.S.C. § 2000e(j), the religious accommodation provision of Title VII. In its opinion, the circuit court first recognized its expression of doubt in an earlier case about the constitutionality of the religious accommodation rule. It went on, however, to uphold the provision, after applying the three-part test for analyzing an establishment clause challenge to a statute laid down in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). With respect to the first part of the test, which is whether the statute reflects a clearly secular legislative purpose, the court found that the purpose of the statute was to prevent discrimination in employment. The advancement of religion, cited by opponents as the purpose of the amendment, was a natural consequence of the law, the court stated, but not its direct aim. The second part of the *Nyquist* test, whether the statute has a primary effect that neither advances nor inhibits religion, was also found by the court to have been satisfied, since the court found that the practical effect of the provision was to restrain employers from enforcing uniform, facially neutral work rules that discriminate in effect against employees holding certain religious beliefs. The *Cummins* court also failed to find any violation of the third *Nyquist* test, that the statute must avoid excessive government entanglement with religion. In sum, the Sixth Circuit in *Parker* held that the religious accommodation provision of Title VII satisfied all three *Nyquist* tests and, therefore, it did not violate the establishment clause of the first amendment.

In contrast, a recent district court case is illustrative of those courts that have taken the opposite view. In *Anderson v. General Dynamics Convair Aerospace Div.*, 23 EPD par. 30,959 (S.D. Cal. 1980), the court in a well written and carefully reasoned opinion reached the conclusion that the religious accommodation provision violates all three *Nyquist* tests. The first test is breached, the court ruled, since the true purpose of the provision, advancement of religion, is evident in the remarks of Senator Jennings Randolph, the statute's sponsor. The court stated:

> The true purpose of the accommodation provision is clearly evident in the remarks of Senator Randolph. who authored the 1972 amendment. Senator Randolph stated that his purpose in sponsoring the amendment was to assure increased religious attendance by those whose religious beliefs prohibited work on certain days. Randolph made no mention of any business necessity or benefit to the general public. No clearly secular legislative purpose is manifested. The intent was unequivocal when he stated:
>
> [T]here has been a partial refusal at times on the part of employers to hire or continue in employment employees whose religious practices rigidly require them to abstain fro work in the nature of hire[sic] on particular days. So there has been . . . a dwindling of membership of some religious organizations because of the situation.
>
> My own pastor in this area, Rev. Delmer Van Horn, has expressed his concern and distress that there are certain faiths that are having a very difficult time, especially with younger people, and understandably so, with reference of a possible inability of employers on some occasions to adjust work schedules to fit the requirements of the faiths of some of their workers.
>
> 118 Cong. Rec. 705 (1972). These remarks apparently served as the compelling impetus for the amendment. (Footnote omitted.)

The second *Nyquist* test also was violated, the court in *Anderson* held, since the primary effect of this religious preference, as sought by Senator Randolph, is "a preconceived and direct benefit to particular religions." Those religions, the court found, were religions that require modification of an employer's work rules. An equally improper effect of the provision, the court continued, was its impermissible discrimination between religion and non-religion, since the statute benefits only those employees who hold religious beliefs.

Finally, the court concluded, the statute failed the third *Nyquist* test, since the enforcement of the statute would result in an impermissible entanglement of government with religion. In support, the court noted that enforcement would require the EEOC and the courts to review work schedules allegedly disfavoring certain religious beliefs involved and to inquire into the validity of the religious nature of the claim. The court in *Anderson* went on to state:

> Religion would have to be defined and its proper exercise delineated. . . . When the courts do attempt to tackle the merits of a claim of religious belief, the results are often confusing, inconsistent and evasive.
>
> Because of the potential for recurring litigation before courts and government agencies concerning difficult questions of the exercise of religious beliefs, the reasonable accommodation clause of Title VII causes excessive government entanglement with religion.

In the absence of any binding authority to guide it, this court finds the reasoning and conclusion set forth in *Anderson* to be persuasive. Accordingly, the court holds that the religious accommodation provision of Title VII, 42 U.S.C. § 2000e(j), violates the establishment clause of the first amendment to the United States Constitution.

Prior cases dealing with this question have exhaustively detailed the legislative history of the offending provision, as well as the various Supreme Court rulings that have outlined the parameters of the first amendment, and it would add little to the corpus juris to repeat that here. Two points do merit a brief discussion, however.

The first point, briefly noted in *Anderson*, is that the situation here presented does not implicate a conflict between the establishment clause and the free exercise clause of the first amendment. Those provisions state: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". Here, the establishment clause violation was triggered by congressional action in enacting this particular provision of Title VII. By striking down the provision, no free exercise problem arises, since no congressional action will have taken place. The first amendment religious freedoms are not triggered by congressional inaction, but rather by its failure to adhere to the admonition that "Congress shall make no law."

The second point, and one that seems to have received little previous attention, is that even though this religious accommodation requirement is unconstitutional, the plaintiff is not automatically foreclosed from pursuing his claim. As the Supreme Court noted in *Trans World Airlines v. Hardiso* [14 EPD par. 7620], 432 U.S. at 74 n.9, the legislative history of the religious accommodation provision demonstrates that it was enacted in large part to counter the decisions in *Dewey v. Reynolds Metals Co.* [2 EPD par. 10,234], 429 F.2d 325 (6th Cir. 1970), *aff'd by an equally divided court* [3 EPD par. 8216], 402 U.S. 689 (1971), and *Riley v. Bendix Corp.*, 330 F.Supp. 583 (M.D. Fla. 1971), *rev'd* [4 EPD par. 7902], 464 F.2d 1113 (5th Cir. 1972). *Dewey* held, *inter alia*, that plaintiff had failed to prove religious discrimination by defendant since plaintiff could not show any subjective intent by the employer to discriminate. Although at the time of that ruling the question of subjective versus inferred intent was unsettled, the Supreme Court subsequently held in *Griggs v. Duke Power Co.* [3 EPD par. 8137], 401 U.S. 424 (1971), that a showing of disparate impact of a challenged employment practice will create a presumption of intentional discrimination. Thus the protection that Congress sought to provide by enacting section 701(j) of Title VII has in large part been rendered redundant and unnecessary by the Supreme Court.

The other apparent concern of Congress was the ruling by the district court in *Riley* that the EEOC regulation requiring religious accommodation, the virtually identical forerunner to section 701(j), was improperly promulgated as beyond the intent of Congress. Although that ruling subsequently was reversed by the Fifth Circuit, the reversal did not occur until after the 1972 amendments to Title VII, including section 701(j), were enacted. That clarification by Congress of its intent by enacting the regulation into statute is now academic, however, since in this court's judgment the requirement of reasonable accommodation violates the first amendment.

Plaintiff in this case may still be able to make out a claim of religious discrimination by showing that Butler's no-beard policy impacts excessively upon persons who grow beards for religious reasons or by showing some disparate impact or treatment related to Butler's refusal to allow him personal leave to attend the religious gathering. The burden of going forward would then shift to Butler's to articulate a legitimate, nondiscriminatory necessity for its policies or actions. Plaintiff could then attempt to rebut any such reasons advanced by showing that such reasons, if proven, were pretextual. In addition, plaintiff's complaint makes a cryptic allegation that members of another (unspecified) race were allowed to have beards for purely social reasons, although he was not. If proven, such conduct may well constitute unlawful disparate treatment by Butler's that violates the prohibition against discrimination based upon race or color. Plaintiff may wish to amplify those allegations in an amended complaint, if he intends seriously to pursue that claim.

In accordance with the foregoing, plaintiff is ALLOWED thirty (30) days to amend his complaint to clarify his allegations of a violation by Butler's of 42 U.S.C. § 2000e-2(a)(1), based upon race, religion or both, if he so chooses.

[Timeliness of Filing]

II. Defendant Butler's also argues that the court lacks subject-matter jurisdiction over this action, since, Butler's claims, plaintiff did not file this action within ninety days from his receipt of the EEOC right-to-sue letter as required by 42 U.S.C. § 2000e-5(f)(1). *See McDonnell Douglas Corp. v. Green* [5 EPD par. 8607], 411 U.S. 792, 798 (1973). Compliance with that filing deadline has been termed a jurisdictional prerequisite. *Genovese v. Shell Oil Co.* [7 EPD par. 9045], 488 F.2d 84 (5th Cir. 1973). Defendant supports its claim by pointing out that plaintiff's right-to-sue letter, a copy of which defendant has appended to its motion, bears the date March 21, 1980. It argues that, in order for this action to have been timely filed, plaintiff must not have received the right-to-sue letter until March 28, 1980 or later, an eventuality that defendant asserts "presumably" would not have occurred.

In response plaintiff has filed an affidavit in which he testifies that he received the right-to-sue letter "on or after March 28, 1980."

Pretermitting any discussion of the United States Postal Service's speed of mail delivery, plaintiff's affidavit has created a factual issue for resolution at trial, the existence of which precludes summary judgment. Accordingly, the issue of whether plaintiff received his right-to-sue letter before or after March 28, 1980 must be resolved at trial, and summary judgment on this ground is Denied.

[Beard as Mutable Characteristic]

III. Defendant Butler's also argues that its no-beard policy could not as a matter of law constitute religious or racial discrimination against defendant, since a no-beard policy affects only a mutable individual characteristic. In support of this argument defendant cites several cases.

The first cited case, *Willingham v. Macon Telegraph Publishing Co.* [5 EPD par. 8585], 352 F.Supp. 1018 (M.D. Ga. 1972), *rev'd,* 482 F.2d 535 (5th Cir. 1973), *vacated* [9 EPD par. 9957], 507 F.2d 1084 (en banc), is inapposite to the issue of religious discrimination. There the Fifth Circuit held that a hair-length limit for men did not constitute unlawful *sex* discrimination since it involved a mutable personal characteristic that did not implicate a fundamental right such as marriage or childbearing. In contrast, the issues in this case should plaintiff amend his complaint may be (a) whether, even if defendant Butler's no-beard policy was facially neutral and uniformly applied (which plaintiff alleges it was not), the policy had a disparate impact upon plaintiff's religious beliefs; and (b) whether the no-beard policy was applied to plaintiff but not to members of a different *race*, which might constitute impermissible disparate treatment.

The second case cited by defendant, *EEOC v. Rollins, Inc.* [8 EPD par. 9557], 8 FEP Cas. 492 (N.D. Ga. 1974) (Freeman, J.), is not only unpersuasive but in fact supports plaintiff's position on this issue. There this court declined to grant dismissal or summary judgment on the pleadings before the court on the ground that it could not say as a matter of law that an employer's refusal to allow a black muslim employee to wear certain clothing may never amount to religious discrimination within the purview of Title VII. The court cited the panel opinion in *Willingham*, later vacated as in "accord" with its ruling.

Despite the holding of that case, however, defendant advances the argument that, since that panel opinion in *Willingham* cited by Judge Freeman was later vacated and overturned on rehearing, the district court in *Rollins* would likely have ruled differently had it had the en banc opinion before it when it ruled. Defendant's conclusion misses the mark, however. The court in *Rollins* principally relied on *Cook & Nichol, Inc. v. Plimsoll Club*, 451 F.2d 505 (5th Cir. 1971), as authority for its ruling. That case merely reiterates, albeit forcefully and admonitorily, the settled rule that dismissal for failure to state a claim is inappropriate unless it appears to a certainty that plaintiff would not be entitled to recover under any state of facts which could be proved in support of his claim. Judge Freeman only cited *Willingham* as tangential support for the *Rollins* ruling, and this court is not persuaded that *Rollins* would have been decided differently had the en banc opinion in *Willingham* been handed down prior to the *Rollins* order.

The third case cited by defendant, *Thomas v. Firestone Tire & Rubber Co.* [9 EPD par. 10,219], 392 F.Supp. 373 (N.D. Tex. 1975), is equally unpersuasive in that it involved alleged discrimination based upon sex and race, not religion.

Defendant has cited only two cases that in any way implicate alleged religious discrimination.

In *Cupit v. Baton Rouge Police Dept.* [6 EPD par. 8795], 277 so.2d 454 (La. App. 1973), a no-beard policy by the police department was upheld against religious discrimination charges. The case was a constitutional challenge to a departmental regulation, however, rather than a Title VII claim, and did not involve the statutory provisions at issue here. For that reason, it does not support defendant's position that it could not as a matter of law have violated Title VII through its no-beard policy.

Similarly, *Eastern Greyhound Lines Civ. v. New York State Div. of Human Rights,* 27 N.Y.2d 2[illegible], 265 N.E.2d 745 (Ct.App. 1970), also cited by defendant, involved a state human rights statute, not Title VII, and thus sheds no light upon this issue of statutory construction. That state statute varies widely in its structure from Title VII. It contains a lengthy and detailed set of provisions as to religious sabbaths and holy days, together with exceptions for emergencies, for health and safety occupations, with no mention of religious dress or appearance practices. *See* N.Y. Executive Law, Art. 15 (McKinney).

This court is not convinced to a certainty that plaintiff may not be entitled to recover under any state of facts that could be proved in support of his claims, and therefore dismissal for failure to state a claim is inappropriate at this time. *See Cook & Nichol, Inc. v. Plimsoll Club, supra.*

Based upon the foregoing, Butler's motion to dismiss on the ground that its no-beard policy could not as a matter of law violate Title VII is DENIED.

[Jury Demand]

IV. Defendant Butler's also moves to strike plaintiff's jury demand. In plaintiff's amended complaint, allowed filed by this order, he alleges two counts upon which he seeks relief. The first count is based upon defendant's alleged violation of Title VII, and plaintiff apparently does not seek a jury trial upon this count. The second count alleges a conspiracy by four named individual defendants to injure plaintiff's work record and business reputation. Plaintiff asserts that this conspiracy and acts in furtherance of it resulted in his termination from employment with Butler's. He prays in his complaint for a jury trial on this count, which relies on diversity of citizenship of the parties for jurisdiction.

In support of its motion, defendant cites several cases including *Blum v. Gulf Oil Corp.* [20 EPD par. 30,047], 597 F.2d 936 (5th Cir. 1979); *United States v. United States Steel Corp.* [10 EPD par. 10,436], 520 F.2d 1043 (5th Cir. 1975); *Lynch v. Pan American World Airways, Inc.* [5 EPD par. 8517], 475 F.2d 764 (5th Cir. 1973); and *Baker v. City of Detroit,* 458

F.Supp. 379 (E.D. Mich. 1973). Although these cases are distinguishable from the situation presented here, since none of them deal with distinct diversity claims against non-employer defendants, plaintiff has not opposed this motion and it is therefore GRANTED. Local Rule 91.2.

[Conclusion]

V. In summary, the court grants in part defendant Butler's motion to dismiss, grants defendant Butler's motion to strike plaintiff's jury demand, allows filed plaintiff's proposed amended complaint appended to his opposition to defendant Butler's motion to dismiss, and allows plaintiff thirty (30) days to re-amend his complaint in light of this order. The clerk is directed to modify the court's records to reflect the names of the four individual defendants named in the amended complaint.

—Footnotes—

[1] Plaintiff has filed as Exhibit B to his brief opposing this motion a proposed amended complaint substituting four named parties in place of the "John Does" named in his original complaint, and omitting the claim for breach of contract contained in his original complaint. Defendant Butler's has indicated to the court by letter dated October 20, 1980 that it does not oppose the filing of plaintiff's proposed amended complaint and it is therefore ALLOWED filed as of the date of this order.

[2] *Cummins v. Parker Seal Co.* [9 EPD par. 10,171], 516 F.2d 544, 554 (6th Cir. 1975) (Celebrezze, J., dissenting); *Anderson v. General Dynamics Convair Aerospace Div.,* 23 EPD par. 30,959 (S.D. Cal. 1980); *Gavin v. Peoples Natural Gas* [19 EPD par. 9033], 464 F.Supp. 622 (W.D. Pa. 1979); *Yott v. North American Rockwell Corp.* [13 EPD par. 11,599], 428 F.Supp. 763 (C.D. Cal. 1977).

[3] *Cummins v. Parker Seal Co., supra*; *Tooley v. Martin-Marietta Corp.* [21 EPD par. 30,440], 476 F.Supp. 1027 (D. Ore. 1979); *Jordan v. North Carolina Natl Bank* [9 EPD par. 10,048], 399 F.Supp. 172 (W.D. N.C. 1975).

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

RECEIVED
81
LEGAL
A. O. SMITH CORP.

April 20, 1981.

Before

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILBUR F. PELL, JR., Circuit Judge

DARREL C. NOTTELSON, Plaintiff-Appellee
and EQUAL EMPLOYMENT OPPORTUNITY
COM'N,
Intervenor-Appellee,
No. 80-1678, 80-1705 vs.
SMITH STEEL WORKERS D.A.L.U. 19806
and A. O. SMITH CORPORATION,
Defendants-Appellants.

Appeal from the United
States District Court
for the Eastern District of Wisconsin.
No. 75-C-220
Robert W. Warren,
Judge.

ORDER

On consideration of the petitions for rehearing and suggestions for rehearing *en banc* filed in the above-entitled cause by defendants-appellants Smith Steel Workers and A. O. Smith Corporation and the responses thereto, a vote of the active members of the Court was requested, and a majority* of the active members of the Court have not voted to grant a rehearing *en banc*. A majority of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

* Chief Judge Fairchild and Circuit Judges Pell, Wood and Bauer voted to grant the petition.

§ 19 (29 U.S.C. § 169) of the NLRA, as amended.

[The 1974 amendment for health care institutions, § 3 of P.L. 93-360 (July 26, 1974), is placed first, followed by a December, 1980 amendment, P.L. 96-593 (December 24, 1980), which is now § 19 of the NLRA, as amended.]

Individuals with religious convictions

Any employee of a health care institution who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required, in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious charitable fund exempt from taxation under section 501(c)(3) of Title 26, chosen by such employee from a list of at least three such funds, designated in a contract between such institution and a labor organization, or if the contract fails to designate such funds, then to any such fund chosen by the employee.

July 5, 1935, c. 372, § 19, as added July 26, 1974, Pub.L. 93—360, § 3, 88 Stat. 397.

Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employees' employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation under section 501(c)(3) of title 26 of the Internal Revenue Code, chosen by such employee from a list of at least three such funds, designated in such contract or if the contract fails to designate such funds, then to any such fund chosen by the employee. If such employee who holds conscientious objections pursuant to this section requests the labor organization to use the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such procedure. [December 24, 1980, P. L. 96-593.]

[Excerpt from the Legislative History of Section 701(j) of Title VII of the Civil Rights Act of 1964. Legislative History of The Equal Employment Opportunity Act of 1972, Volume 2, 711-715 (1972); also reported at Congressional Record, Volume 118, Part 1, 705-706 (92d Congress, 2d Sess, Jan. 21, 1972).[1]]

* * * *

The Senate continued with the consideration of the bill (S. 2515) a bill to further promote equal employment opportunities for American workers.

Mr. RANDOLPH. Mr. President, I send an amendment to the desk and ask that it be stated.

The ACTING PRESIDENT pro tempore. The Chair is advised that there is an amendment pending. Is the amendment of the Senator from West Virginia an amendment to that amendment or is the Senator asking that the pending amendment be set aside?

Mr. DOMINICK. Mr. President, I ask unanimous consent that the pending amendment, the Dominick amendment, be set aside temporarily so that the Senator from West Virginia (Mr. Randolph) may present his amendment, and that the Dominick amendment be taken up immediately after completion of the amendment of the Senator from West Virginia.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

---

[1] This Appendix includes the legislative debate with respect to the enactment of Section 701(j). Senator Randolph also inserted into the record the court decisions in *Dewey* v. *Reynolds Metals Co.* and *Riley* v. *The Bendix Corp.*, both *supra*, as well as EEOC guidelines and regulations. *See* Legislative History, Vol. 2, *supra*, 715-776; Congressional Record, Vol. 118, Pt. 1, *supra*, 706-731. These latter documents are not included herein because of their length.

The amendment of the Senator from West Virginia will be stated.

The legislative clerk read as follows:

> On page 33, after line 13, insert the following:
>
> "(6) After subsection (i) insert the following new subsection (j):
>
> "(j) The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

Mr. RANDOLPH. Mr. President, it is my hope that we can have a roll-call vote on this amendment, not that there is opposition to the amendment itself, but it is felt that a rollcall would serve a constructive purpose.

I am grateful to my able colleague from Colorado for permitting me to use just a few minutes in presenting the reasons why I have proposed this amendment to the pending legislation.

Mr. President, I ask unanimous consent to include as cosponsors of the amendment the Senator from New York (Mr. Javits), the Senator from Maryland (Mr. Beall), and the Senator from California (Mr. Cranston).

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. RANDOLPH. Mr. President, freedom from religious discrimination has been considered by most Americans from the days of the Founding Fathers as one of the fundamental rights of the people of the United States. Yet our courts have on occasion determined that this freedom is nebulous, at least in some way. So in presenting this proposal to S. 2515, it is my desire and I hope the desire of my colleagues, to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law.

I am sure that my colleagues are well aware that there are several religious bodies—we would call them religious sects; denominational in nature—not large in membership, but with certain strong convictions, that believe there should be a steadfast observance of the Sabbath and require that the observance of the day of worship, the day of the Sabbath, be other than on Sunday. On this day of worship work is prohibited whether the day would fall on Friday, or Saturday, or Sunday. There are approximately 750,000 men and women who are Orthodox Jews in the U.S. work force who fall in this category of persons I am discussing. There are an additional 425,000 men and women in the work force who are Seventh-day Adventists.

Mr. President, I am a member of a denomination which is a relatively small one, the Seventh Day Baptists. Perhaps there are only 5,000 individuals within that denomination in the work force. I do think it is important for me to say that within the groups that I have mentioned, we think in terms of our observance of the Sabbath beginning at sundown Friday evening and ending at sundown Saturday evening, following the Biblical words, "From eve unto eve shall you celebrate your Sabbath." I make this statement only by way of explanation of the groups I have just mentioned.

I think it is important for use to realize that the persons for whom I hope I speak—and I hope I speak for all persons in this matter—are workers scattered throughout the United States of America. There is no section of the country which would not be affected, we hope constructively, by the adoption of this amendment.

I say to the distinguished chairman of the Labor and Public Welfare Committee, who manages this bill, that there has been a partial refusal at times on the part of employers to hire or continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days. So there has been, because of understandable pressures, such as commitments of a family nature and otherwise, a dwindling of the membership of some of the religious organizations because of the situation to which I have just directed attention.

I hold my membership in our church here in this area. We have the Washington Seventh Day Baptist Church. We have several of those churches in my State of West Virginia. At an earlier period I held my membership in the Salem, W. Va., Seventh Day Baptist Church.

I invite the attention of my able colleague to the fact that in the State of New Jersey there are many, many Seventh Day Baptist churches. In places like Shiloh, Marlboro, and Plainfield—actually being the headquarters of the denomination to which I belong, located close to New York City, but actually located in the State of New Jersey.

My own pastor in this area, Rev. Delmer Van Horne, has expressed his concern and distress that there are certain faiths that are having a very difficult time, especially with the younger people, and understandably so, with reference to a possible inability of employers on some occasions to adjust work schedules to fit the requirements of the faith of some of their workers.

The term "religion" as used in the Civil Rights Act of 1964 encompasses, as I understand it, the same concepts as are included in the first amendment—not merely belief, but also conduct; the freedom to believe, and also the freedom to act.

I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State, or local governments. Unfortunately, the courts have, in a sense, come down on both sides of this issue. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on the question.

The amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved. I think it is needed not only because court decisions have clouded the matter with some uncertainty; I think this is an appropriate time for the Senate, and hopefully the Congress of the United States, to go back, as it were, to what the Founding Fathers intended. The complexity of our industrial life, the transition of our whole are of employment, of course are matters that were not always understood by those who led our Nation in earlier days.

Mr. President, the competent chairman of the Labor and Public Welfare Committee, who is the chief sponsor of S. 2515, and who is floor managing the very bill before us, I believe understands and appreciates, and I hope agrees with, the arguments that I am presenting. I have had some opportunity to counsel with him in reference to the amendment. I hope he can agree that there can be at least an agreement on the amendment, even though we have a roll call upon it, hopefully in the next few minutes. I think it is a well-intentioned amendment, a necessary amendment, a worthwhile amendment because it carries through the spirit of religious freedom under the Constitution of the United States.

Mr. President, I, therefore, urge most earnestly the adoption of the amendment.

Mr. **Dominick**. Mr. President, will the Senator yield?

Mr. **Randolph**. I yield to my colleague from Colorado.

Mr. **Dominick**. I have listened very carefully to the Senator's presentation, and was impressed by it. Could the Senator tell me, whether this amendment would also affect, for example, the Amish, or some other religious sect which has a different method of conducting their lives than do most Americans?

Mr. **Randolph**. Yes; I envisage that it would.

Mr. **Dominick**. Would it apply to the following situation? A young man I just talked to from Virginia, works 15 days on and then is off 15 days. Would the amendment require an employer to change that kind of employment ratio around, so that he would have to work a customary 5- or 6-day week?

Mr. **Randolph**. I do not believe that an undue hardship would come to such an employer. The Senator has explained a specific case. I do not believe that there are really problems that would flow from the adoption of this amendment in connection with the employer meeting situations that he could not properly handle with employees.

Mr. **Dominick**. I thank the Senator. I think this amendment will be helpful. All of these various situations keep arising because of our pluralistic method of conducting our business in this country. It is hard to foresee far enough ahead so that each specific type of case can be anticipated.

Am I correct in understanding that the amendment allows flexibility both to the EEOC and to its investigators to determine whether or not any particular group of religious adherents are having their customary observance of their religious activities unduly interfered with? In other words, flexibility is provided so that someone could make a discretionary judgment on it?

Mr. RANDOLPH. The Senator from Colorado correctly follows me in the thinking that I have placed in the language of the amendment, that there would be such flexibility, there would be this approach of understanding, even perhaps of discretion, to a very real degree.

I agree with the Senator's feeling, and I am sure that that is what is meant and would flow from the adoption of the practice under the amendment.

Mr. DOMINICK. I thank the Senator from West Virginia.

Mr. WILLIAMS. Mr. President, will the Senator yield?

Mr. RANDOLPH. I yield.

Mr. WILLIAMS. I did not follow the last colloquy entirely, and perhaps this is the same question, but where the employment is such that the job has to be done on a day that a person under his faith would make his religious observations, it might be an undue hardship to close down the operation to accommodate that person. There are jobs that are Saturday and Sunday jobs, and that is all, serving resorts and other areas. Certainly the amendment would permit the employer not to hire a person who could not work on one of the 2 days of the employment; this would be an undue hardship, and the employer's situation is protected under the amendment offered by the Senator from West Virginia, is it not?

Mr. RANDOLPH. That is correct; yes. I am in agreement with the Senator's statement.

Mr. WILLIAMS. It seems to me that this codifies a very worthy general practice, but there are situations—

Mr. Randolph. There are the gray areas, and I recognize them. But I think the thrust of what we would have here is important at this time.

Mr. Williams. Yes.

Mr. Randolph. The purpose to be achieved.

Mr. Williams. The Senator and I are employers. As a matter of practice, we recognize the days of religious observations of some of our staffs, even though they are regular working days, generally, of the Senate, its committees, and its officers.

Mr. Randolph. That is correct. I know of many instances of that kind. I think that usually the persons on both sides of this situation, the employer and the employee, are of an understanding frame of mind and heart. I do not think they try to present problems. I do not think they try to have abrasiveness come into these decisions. I think they are just building upon conviction, and, hopefully, understanding and a desire to achieve an adjustment; and if in perhaps a very, very small percentage of cases that is not able to be accomplished, that should not deter the Senate in its action in approving this amendment.

Mr. Williams. As I read the first amendment of the Constitution, there is no problem here presented by the amendment in connection with the first clause:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

In dealing with the free exercise thereof, really, this promotes the constitutional demand in that regard.

I certainly agree with the objective of the amendment.

Mr. Randolph. I appreciate what the able chairman is saying. I refer to the presence in the Chamber of our colleague from Ohio (Mr. Saxbe). There are, in the Seventh Day Baptist Church, of which I 'am a member, many individual members of our faith who belong to our churches within the State of Ohio. We have, usually, small churches in small communities in the State the Senator so ably represents.

I add also the Senator from Colorado. I think it is not inappropriate for me to say that one of our strong churches is in Denver. Another of our strong churches is in Boulder, in the State of Colorado. So, although we are a small denomination, it goes across the country in major cities and smaller communities, where people of a belief feel that insofar as possible, the law flowing from the original Constitution of the United States should protect their religious freedom, and hopefully their opportunity to earn a livelihood within the American system, which has become, of course, as has been indicated, more pluralistic and more industrialized through the years.

I ask unanimous consent that the cases and regulations which are applicable to this issue be printed at this point in the Record.

Opposition

1

Office - Supreme Court, U.S.
FILED
NOV 23 1981
ALEXANDER L. STEVAS.
CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-679

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,
SILVERGATE LODGE 50, An Association,
Petitioner,

vs.

DAVID ANDERSON, et al.,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVID WATKINS
Suite 700 Tower East
1341 W. Mockingbird Lane
Dallas, Texas 75247
(214) 638-6663
Attorney for Respondent, David Anderson

Of Counsel:
JENKINS & WATKINS, INC.
Suite 700 Tower East
1341 W. Mockingbird Lane
Dallas, Texas 75247

JOHNS AND CARSON
6930 Carroll Avenue, Suite 629
Washington, DC 20012

SOUTHWESTERN LAW PRESS—DALLAS, TEXAS—(214) 748-6022

INDEX

Page

List of Authorities iii

Opinions Below 1

Jurisdiction 2

Question Presented 3

Statutory and Constitutional Provisions Involved 3

Counter-Statement of the Case 4

Arguments Against Granting the Writ 8

1. Only The Constitutional Question May Be Properly Before This Court 8

   A. The Lower Courts Considered Only The Constitutional Question in Anderson II ... 8

   B. The IAM Has Heretofore Failed In Either Anderson I Or Anderson II To Give Proper Notice Pursuant To Rule 44, Federal Rules Of Appellate Procedure, Or 28 U.S.C. ¶ 2403 9

II. The Ninth Circuit Correctly, And Consistently With Another Court of Appeals and This Court, Held 701(j) Is Constitutional 9

   A. The Ninth Circuit Correctly Held That 701(j) Is Constitutional 9

   B. No Conflict Exists Among The Circuit Courts That 701(j) Is Constitutional 10

   C. No Conflict Exists Between The Ninth Circuit And This Court.................. 11

   D. Congressional Action Reaffirms Charity-Substitution 12

III. Other Reasons Against Granting Certiorari .12

   A. Issues in Anderson I 12

   B. Purported Conflict Between the Circuits . .12

Conclusion 13

List of Authorities

Cases Page

Allen v. Grand Cent. Aircraft Co., 347 U.S. 535 (1954). 12

Anderson v. General Dynamics Convair Aerospace Division, 430 F.Supp. 418 (S.D. Cal. 1977); rev'd. 589 F.2d 397 (9th Cir 1978); reh. and reh. en banc den'd. January 16, 1979; cert. den'd. sub nom. International Association of Machinists v. Anderson, 442 U.S. 921 (1979); 489 F.Supp. 782 (S.D. Cal. 1980); rev'd. 648 F.2d 1247 (9th Cir. 1981) .... Passim

Burns v. Southern Pacific Transportation Company, 20 EPD 30, 184, (D.C. Ariz. 1979) 10

California v. Taylor, 353 U.S. 553 (1957) 8

Chrysler Corp. v. Mann, 561 F.2d 1282 (8th Cir. 1977) 10

Cooper v. General Dynamics, 533 F.2d 163 (5th Cir. 1976); rehearing en banc den'd. 537 F.2d 1143; cert. den'd. sub nom. International Association of Machinists v. Hopkins, 433 U.S. 908 (1977) 13

Cort v. Ash, 442 U.S. 66 (1975) 8

Cummins v. Parker Seal Company, 516 F.2d 544 (6th Cir. 1975); aff'd. sub nom. Parker Seal Company v. Cummins by an equally divided court 429 U.S. 65 (1976); vacated on other grounds 433 U.S. 903 (1977); vacated on other grounds 561 F.2d 658 (6th Cir. 1977) 10

D.C. Federation of Civid Associations v. Volpe, 459 F.2d 1231 (D.C. Cir. 1972); cert den'd. 405 U.S. 1030 (1972) 8

Fullilove v. Klutznick, 448 U.S. 448 (1980) 10

Gavin v. Peoples Natural Gas Co., 464 F.Supp. 622 (W.D. Penn. 1979); rev'd. on other grounds 613 F.2d 482 (3d Cir. 1980) 11

Hardison v. Trans World Airlines, Inc., 527 F.2d 33 (8th Cir. 1975); rev'd. on other grounds sub nom. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) ....Passim

List of Authorities — (Continued)

Cases Page

Helvering v. Griffiths, 318 U.S. 371 (1943) 12

Issac v. Butler Shoe Corp., 25 EPD 31, 757 (N.D. Ga. 1980) 10

Jones v. Liberty Glass Co., 332 U.S. 524 (1947) 12

Jordon v. North Carolina National Bank, 399 F.Supp. 172 (W.D. N.C. 1975); rev'd. on other grounds 565 F.2d 79 (4th Cir. 1977) 10

McDaniel v. Essex, 509 F.Supp. 1055 (W.D. Mich. (1981) 10

National Labor Relations Board v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 10

Nottelson v. A. O. Smith, 489 F.Supp. 94 (E.D. Wis. 1980); aff'd. 643 F.2d 445 (7th Cir. 1981) ..... Passim

Rankins v. Commission of Professional Competence, 593 P.2d 582 (1979); appeal dism'd. 444 U.S. 986 (1979) 13

Scott v. Southern California Gas Co., 8 EPD 9450 (C.D. Cal. 1973) 11

Thomas v. Review Board of Indiana Employment Security Division, 391 N.E.2d 1127 (Ind.Sup.Ct. 1979); rev'd. ___ U.S. ___ 67 L.Ed.2d 624 (1981) ... 11

Tooley v. Martin Marietta Corp., 476 F.Supp. 1027 (D.C. Ore. 1979); aff'd. 648 F.2d 1239 (9th Cir. 1981) 9

Ward v. Allegheny Ludlum Steel Corp., 397 F.Supp. 375 (W.D. Penn. 1975); rev'd. on other grounds 560 F.2d 579 (3d Cir. 1977) 10

Wise v. Lipscomb, 437 U.S. 535 (1978) 8

Yott v. North American Rockwell Corp. (Yott II), 428 F.Supp. 763 (C.D. Cal. 1977); aff'd. on other grounds 602 F.2d 904 (9th Cir. 1979) 11

Constitution and Statutes

28 U.S.C. ¶ 2403 8

List of Authorities — (Continued)

Other Authorities Page

National Labor Relations Act, as amended:
29 U.S.C. § 158(a)(3) 3
29 U.S.C § 169 12

Title VII of the Civil Rights Act of 1964,
42 U.S.C. § 2000e, et seq.
§701(j), 42 U.S.C. § 2000e(j) .... Passim
§703(a)(1), 42 U.S.C. § 2000e-2(a)(1) 3
§703(a)(2), 42 U.S.C. § 2000e-2(a)(2) 3
§703(c)(1), 42 U.S.C. § 2000e-2(c)(1) 3, 4
§703(c)(2), 42 U.S.C. § 2000e-2(c)(2) 4
§703(c)(3), 42 U.S.C. § 2000e-2(c)(3) 4

United States Constitution,
First Amendment .... Passim

Other Authorities

Federal Rules of Appellate Procedure, Rule 44 9

Supreme Court Rules 17.1(a), 19.3, 21.1(f), 21.4,
22.2, 22.3, and 28.4 ....

S.16615-16, Cong. Rec. 12

H.R. 4774, 96th Cong., 1st Sess. (1979) 12

In The

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-679

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,
SILVERGATE LODGE 50, An Association,
Petitioner,

vs.

DAVID ANDERSON, et al.,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent, David Anderson, herein called "Anderson", hereby files his opposition to granting the Petition for Writ of Certiorari in the above-captioned matter of the International Association of Machinists and Aerospace Workers, AFL-CIO, Silvergate District Lodge 50, herein called "IAM".

OPINIONS BELOW

In *Anderson II,* the opinions of the United States Court of Appeals for the Ninth Circuit, reversing the second opinion of the District Court for the Southern District of California, are reported at 648 F.2d 1247 (9th Cir. 1981) and 489 F.Supp. 782 (S.D. Cal. 1980), and are set forth in the Appendix for the Petition of Certiorari at pgs. A1-A3 and B1-B18, respectively.

The original opinion of the District Court for the Southern District of California in *Anderson I* is reported at 430 F.Supp. 418 (S.D. Cal. 1977); rev'd. by the opinion of the United States Court of Appeals for the Ninth Circuit reported at 589 F.2d 397 (9th Cir. 1978); reh. and reh. en banc den'd. January 16, 1979; cert. den'd. *sub nom. International Association of Machinists v. Anderson*, 442 U.S. 921 (1979) (Docket No. 78-1650) and set forth in the Appendix of the Petition for Certiorari as E1-E8, D1-D9, and C1, respectively.[1]

JURISDICTION

The Court of Appeals entered judgment on June 23, 1981. The IAM timely applied for and received an extension of time to October 9, 1981 to file its Petition for Certiorari. However, the IAM seeks to re-litigate issues not present in *Anderson II*, and only the constitutional attack on 42 U.S.C. § 2000e(j) may be properly before this Court.[2]

---

[1] Petitioner cites the District Court Opinion in *Anderson I* as 431 F.Supp. 418 in its Table of Authorities and Brief, and 413 F.Supp. 418 in its Table of Contents for the Appendix. The lower court opinion in *Anderson I* is reported at 430 F.Supp. 418.

[2] Pursuant to Supreme Court Rule 22.3 the objection to jurisdcition is set out *infra*. Because the IAM attempts to resubmit identical issues already presented to this Court, Anderson adopts and reaffirms its points and authorities set forth in his Opposition in 78-1650. In compliance with Supreme Court Rule 22.2, Anderson reaffirms but does not reprint his Opposition in 78-1650.

QUESTION PRESENTED

1. Does the statutory duty of reasonable accommodation imposed by 42 U.S.C. § 2000e(j), (§ 701(j) of the Equal Employment Opportunity Act of 1972) violate the Establishment Clause of the First Amendment to the Constitution?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant provisions of 29 U.S.C. § 158(a)(3) are set forth in the Petition for Cert. (Pet. 1-2).

The Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e, et seq., provides in relevant part as follows:

Section 701(j) states:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Section 703(a) states in pertinent part:

> It shall be an unlawful employment practice for an employer:
>
> (1) . . . otherwise to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's . . . religion . . .; or
>
> (2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . religion . .

Section 703(c) states in pertinent part:

> (c) It shall be an unlawful employment practice for a labor organization —
>
> (1) . . . otherwise to discriminate against any individual because of his . . . religion . . .; or
>
> (2) to limit, segregate, or classify its membership . . . in any way which would deprive or tend to deprive any individual of employment opportunities, or . . . otherwise adversely affect his status as an employee . . . because of such individual's . . . religion . . .; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

COUNTER-STATEMENT OF THE CASE

Anderson has been an employee of General Dynamics Convair Aerospace Division since October 11, 1956. He was discharged June 16, 1972, after almost 16 years of service, at the request of the IAM. For many years, the IAM has represented a bargaining unit of which Anderson is a member. Between 1959 and 1972 General Dynamics and IAM had in effect a collective bargaining agreement concerning the wages, hours and working conditions of employees similarly situated as Anderson.

In 1972, General Dynamics and the IAM agreed to a union security clause providing that all employees in Anderson's collective bargaining unit must, as a condition of continued employment, join the union within 10 days after the 30th day following the effective day of the collective bargaining agreement. This agreement became effective April 3, 1972, but as of June 14, 1972 Anderson had not become a member of the IAM. Anderson's termination was requested by the Union on June 14, 1972, and effectuated by the Company two days hence for failure to become a member of or pay monies to the

IAM. Anderson's termination resulted solely from his refusal to become a member of or contribute monies to the IAM.

Since 1959, Anderson has also been a member of the Seventh-day Adventist Church. He subscribes to the Church's teaching against joining or contributing monies to a labor organization. The Seventh-day Adventist Church teaches its members that to join or contribute monies to a labor organization violates the principles and tenets of the Bible as interpreted by the Church. However, the decision not to join and/or support a labor union is a growth process left to the individual conscience of each member. A Seventh-day Adventist who does not understand the teachings of the Church regarding labor unions will not be disfellowshipped for an association, but once an Adventist understands those teachings, he places his eternal salvation in jeopardy by contributing monies to a union.

Previous to his discharge, neither the IAM nor General Dynamics offered Anderson any alternatives or accommodations with respect to his religious beliefs. Anderson was advised only that he was required to subscribe to the union security agreement between General Dynamics and the IAM or be fired. The Church forbids its members from joining or financially supporting any union based on its interpretation of the Bible, Spirit of Prophecy, Law of God, and Baptismal Vows. Anderson sincerely believes individually the teachings of the Church, and construes literally the teachings of the Seventh-day Adventist. Anderson has offered to pay the equivalent of the union dues and assessments to a designated charity, but he is not willing to pay the monies through the union.

He is prepared to offer proof to the Union of the charity payments.

In response to the foregoing, Anderson requested an accommodation of his religious beliefs be made by allowing him to pay the equivalency of union dues to an agreed upon charity (a form of accommodation which has been coined "charity-substitution"). Failing to secure the request and accommodation, he was fired on June 16, 1972. Thereafter, Anderson filed charges with the Equal Employment Opportunity Commission on September 27, 1972. On November 6, 1972, the EEOC referred the Complaint to the California Fair Employment Practice Commission, the appropriate state agency regulating employment practices. The state agency, in turn, referred the matter back to the jurisdiction of the EEOC on December 6, 1972, and on April 2, 1974, a decision was entered finding reasonable cause to believe that the IAM had violated Anderson's statutory rights under Title VII. Thereafter, Anderson timely filed suit in the United States District Court for the Southern District of California sitting in San Diego, California on October 3, 1975.

On October 16, 1975, Anderson filed his First Amended Complaint seeking reinstatement, back pay, attorney's fees, and injunctive relief against General Dynamics and the IAM. The case was tried before the court without a jury, resulting in a judgment against him, and Anderson appealed to the Ninth Circuit Court of Appeals.

On appeal in *Anderson I,* the Ninth Circuit held that Anderson, to establish a *prima facie* case of discrimination under Title VII, must plead and prove: (1) he had a bona fide belief that payment of union dues was contrary to his religious faith; (2) inform the IAM that his religious views were in conflict with the union security agreement; and (3) he was discharged for his refusal to join or pay monies to IAM. The case at the trial court proceeded to trial only after extensive stipulations were reached by the parties and approved by the court. The Court held in *Anderson I,* both by stipulation of fact and presentation of evidence, that he had established his *prima facie* case.

The Union on appeal urged affirmance on the finding by the trial court that Anderson's refusal to pay the equivalent of union dues to a charity, to the union for distribution, was based on distrust of unions in general. The circuit court dealt squarely and directly with this contention, as well as the other arguments of the IAM, and held that the IAM had not carried its burden to accommodate or to demonstrate undue hardship. In reversing the district court, the appellate court found the IAM had made no effort to accommodate Anderson's particular religious beliefs. Further, the Ninth Circuit rejected the argument that failure of charity-substitution payments, to the union, for charitable purposes was an undue hardship as a matter of law. Finally, the Court held that the evidence offered did not demonstrate that undue hardship under the facts in this case, in fact, existed.

The IAM sought certiorari in *Anderson I* on the same points it now brings forward in *Anderson II.* Following denial of certiorari by this Court in *Anderson I,* the district court granted summary judgment for the IAM and General Dynamics finding that 701(j), on its face, violated the First Amendment. On appeal in *Anderson II,* the Ninth Circuit reversed the District Court and held that 701(j) is constitutional.

ARGUMENTS AGAINST GRANTING THE WRIT

I. *Only the constitutional question may be properly before this Court.*

A. The lower courts considered only the constitutional question in *Anderson II.*

Anderson objects to the consideration by this Court of any issue other than the attack on the constitutionality of 701(j).[3] The IAM attempts in *Anderson II* to re-submit a cornucopia of issues previously brought forward to this Court in *Anderson I*, Docket No. 78-1650. On remand in *Anderson II* the only defense urged by the IAM (or GD) was the unconstitutionality of 701(j). *Id., 489 F.Supp. at 783.* The IAM presented no cross-appeals to the Ninth Circuit urging it to reconsider its decision on duty or scope of a reasonable accommodation in *Anderson II* (see Appellee's Brief to the Ninth Circuit dated October 8, 1980). Instead, the IAM sought only an affirmance of the unconstitutional finding by the District Court. The Supreme Court will not decide a point in an attack upon a judgment below, where the question was not raised or litigated in the lower courts. *California v. Taylor,* 353 U.S. 553, 556 n. 2 (1957); *Cort v. Ash*, 442 U.S. 66, 72 n. 6 (1975); *Wise v. Lipscomb,* 437 U.S. 535, 547 (1978). Accordingly, questions #2 and #3 sought in this Petition and the reasons for granting writ I, II, V, and VI, are precluded from consideration and became final in *Anderson I* under the doctrine of the law of the case. *D. C. Federation of Civic Associations v. Volpe*, 459 F.2d

---

[3] See Supreme Court Rule 22.3. All reference to the Rules therein are to the United States Supreme Court Rules effective June 30, 1980, unless otherwise indicated.

1231, 1267-68 (D.C. Cir. 1972); cert. den'd. 405 U.S. 1030 (1972). The IAM has waived any claim it may have to present to this Court any question other than the constitutional question and may not have properly preserved the constitutional issue.

B. The IAM has heretofore failed in either *Anderson I* or *Anderson II* to give proper notice pursuant to Rule 44, Federal Rules of Appellate Procedure, or 28 U.S.C. ¶ 2403.

Because of the IAM's failure to provide this Respondent with a proof of service as required by Rule 19.3, it cannot be ascertained whether or not the IAM has complied with Rule 28.4 for service upon the Solicitor General of the United States.[4] Heretofore, the IAM has never given notice to the appropriate authorities of its attack on the constitutionality of an Act of Congress. Without waiver that the IAM has never properly presented the constitutional issue, nor is it allowed to present any other issues under the mandate of the Ninth Circuit, certiorari should be denied because *Anderson II* is correctly decided.

II. *The Ninth Circuit correctly, and consistently with another Court of Appeals and this Court, held that 701(j) is constitutional.*

A. The Ninth Circuit correctly held that 701(j) is constitutional.

The Application for Writ of Certiorari should be denied because the Ninth Circuit correctly decided the constitutional issue below. *Anderson II, supra,* 648 F.2d at 1248; *accord, Tooley v. Martin-Marietta Corp.,* 648 F.2d 1239, 1244-46 (9th Cir. 1981).

---

[4] It is noted, however, that the IAM's Petition does not comply with Rule 21.4.

B. No conflict exists among the circuit courts that 701(j) is constitutional.

Since the IAM last sought this Court's review of the constitutional issue, two circuit courts have consistently found 701(j) to be constitutional. *See, Tooley,* Id.; *Nottelson v. A. O. Smith,* 643 F.2d 445, 453-55 (9th Cir. 1981). No circuit court has ever found 701(j) to be unconstitutional. Prior to the denial of certiorari in *Anderson I*, the Third, Fourth, Eighth, and Ninth Circuits had followed proper constitutional construction and avoided the constitutional issue.[5] This judicial restraint is consistent with this Court's admonition to avoid constitutional considerations when possible. *National Labor Relations Board v. Catholic Bishop of Chicago,* 440 U.S. 490, 500 (1979); *Fullilove v. Klutznick*, 448 U.S. 448, 472-73 (1980). Moreover, 701(j) was recently found constitutional by a district court in a charity-substitution case almost identical to the matter *sub judice*. *McDaniel v. Essex*, 509 F.Supp. 1055, 1062-65 (W.D. Mich. 1981).[6]

---

[5] *See, Ward v. Allegheny Ludlum Steel Corp.*, 397 F.Supp. 375, 377 (W.D. Penn. 1975), rev'd on other grounds 560 F.2d 579, 583 n. 25 (3rd Cir. 1977); *Jordon v. North Carolina National Bank*, 399 F.Supp. 172, 180 (W.D. N.C. 1975): rev'd on other grounds 565 F.2d 79 (4th Cir. 1977); *Chrysler Corp. v. Mann, 561 F.2d 1282, 1287 n. 6 (8th Cir. 1977). The Sixth and Eighth Circuits, however, had previously decided that CFR 1605.1, the forerunner to 701(j), was constitutional. See, Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 43-4 (8th Cir. 1975); rev'd on other grounds *sub nom. Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 70 (1977); *Cummins v. Parker Seal Company*, 516 F.2d 544 (6th Cir. 1975); aff'd. *sub nom. Parker Seal Company v. Cummins* by equally divided court 429 U.S. 65 (1976); vacated on other grounds, 433 U.S. 903 (1977); vacated on other grounds, 561 F.2d 658 (6th Cir. 1977).

---

[6] Since denial of certiorari in *Anderson I*, several additional trial courts have found 701(j) constitutional. *See, Burns v. Southern Pacific Transportation Company*, 20 EPD 30,184 (D.C. Ariz. 1979); *Nottelson, supra, 489 F.Supp. 94, 97-8 (E.D. Wis. 1980); Tooley, supra*, 476 F.Supp. 1027, 1029-30 (D.C. Ore. 1979). Cf. *Issac v. Butler Shoe Corp.*, 25 EPD 31,757 (N.D. Ga. 1980). Prior to denial of cer-

Pursuant to Rule 17.1(a), there exists no conflict in the decisions of the Federal Court of Appeals. Rather, the Sixth, Seventh, Eighth, and Ninth Circuits have all found the duty of reasonable accommodation to be constitutional.

C. No conflict exists between the Ninth Circuit and this Court.

There exists no question whether this Court *vel non* reached the constitutional question in *Hardison*. It did not, Id. 432 U.S. at 70. Immediately following the denial of cert. in *Anderson I*, the Supreme Court of Indiana decided a case consistent with the IAM's argument that any accommodation to religious beliefs, which left the employee on different footing to other employees because of those religious beliefs, would violate the Establishment Clause of the First Amendment. *Thomas v. Review Board of Indiana Employment Security Division*, 391 N.E.2d 1127 (Ind. Sup. Ct. 1979). Expressly overruling that argument, and with language supporting Anderson's argument below of legislative free exercise, this Court reversed the Indiana decision. *Thomas v. Review Board of Indiana Employment Security Division,* ___ U.S. ___, 67 L.Ed.2d 624 (1981). If legislation neutral on its face but constitutionally infringing on free exercise in its application must give way to religious practice, legislation neutral on its face and neutral in application which promotes free exercise

---

tiorari in *Anderson I*, some district courts had found 701(j) to be unconstitutional. *Gavin v. Peoples Natural Gas Co.*, 464 F.Supp. 622, 626-33 (W.D. Penn. 1979); rev'd on other grounds 613 F.2d 482, 484 (3d Cir. 1980); *Yott v. North American Rockwell Corp. (Yott II)*, 428 F.Supp. 763, 765-67 (C.D. Cal. 1977); aff'd. on other grounds 602 F.2d 904, 906 (9th Cir. 1979); Cf. *Scott v. Southern California Gas Co., 8 EPD 9150 (C.D. Cal. 1973).*

without undue hardship cannot violate the establishment prohibition of the same constitutional mandate. *Id.* at 633.

D. Congressional action reaffirms charity-substitution.

Congress has recently expanded its legislation in the charity-substitution area to require legislative free exercise through amendments to § 19 of the National Labor Relations Act (29 U.S.C. § 169) consistent with the Ninth Circuit's determination of 701(j). On December 24, 1980, President Carter signed into law H.R. 4774 making charity-substitution absolute and consistent with 701(j). The significance of the new § 19, in dues cases, is to remove the statutorily provided defense of undue hardship and to legislate free exercise. With this Court's long standing holdings that Congress is presumed to be aware of court decisions at the time it passes legislation, it is fair to say that Congress did not have a myopic review that *Hardison,* or any other case, held 701(j) unconstitutional. *Helvering v. Griffiths,* 318 U.S. 371 (1943); *Jones v. Liberty Glass Co.,* 332 U.S. 524 (1947); *Allen v. Grand Cent. Aircraft Co.,* 347 U.S. 535 (1954). *Anderson I* is specifically mentioned in the consideration by Congress recorded at Cong. Rec. S.16615-16, of December 13, 1980.

III. *Other reasons against granting certiorari.*

A. Issues in *Anderson I.*

Anderson adopts those points and authorities set forth in its opposition in 78-1650 at pgs. 21-33.

B. Purported conflict between the circuits.

At pgs. 26 and 27 of its Petition, the IAM suggests that there is a conflict between the circuits based on a reading of *Tooley, supra,* and *Nottelson, supra.* Not only is the broad assertion that the circuits are in conflict an *ipse dixit* reading of those decisions, but the Third Circuit in *Nottelson* went on to reach the substantive question notwithstanding its position on *Rankins v. Commission of Professional Competence,* 593 P.2d 582 (1979); appeal dism'd., 444 U.S. 986 (1979). While reasonable men may differ over the interpretation of a case, the length of judicial imagination could not be stretched to support the proposition that the discussion of *Rankins* in *Nottelson* should be support for the granting of certiorari in the case *sub judice.* A more logical (at least more fair) analogy would be that the Supreme Court did not write the lengthy *Hardison* decision spelling out rights, duties, and responsibilities of the parties if it felt 701(j) was, in fact, unconstitutional. Or, that this Court would not have denied certiorari in *Cooper v. General Dynamics,* 533 F.2d 163 (5th Cir. 1976); hearing en banc den'd. 537 F.2d 1143; cert. den'd. *sub nom. International Association of Machinists v. Hopkins,* 433 U.S. 908 (1977) when this Court held the cert. petition in *Cooper* until after its decision in *Hardison.*

CONCLUSION

This Court's only consideration for certiorari should be the constitutional question although that issue has not been properly preserved for appeal. In any event, there exists no conflict among the circuits, or conflict with this Court's previous opinions in order for the Court to accept certiorari in the present case. The circuit courts below have consistently and correctly decided that 701(j) is constitutional.

The issues reached by the lower courts are now final under the law of the case in *Anderson I.* The only other circuit to decide the issues since denial of certiorari in *Anderson I* also has found 701(j) constitutional.

For the above reasons, the Writ of Certiorari should be denied.

Respectfully submitted,

DAVID WATKINS
Suite 700 Tower East
1341 W. Mockingbird Lane
Dallas, Texas 75247
(214) 638-6663
Attorney for Respondent,
David Anderson

Of Counsel:
JENKINS & WATKINS, INC.
Suite 700 Tower East
1341 W. Mockingbird Lane
Dallas, Texas 75247

JOHNS AND CARSON
6930 Carroll Avenue, Suite 629
Washington, DC 20012

Opposition

2

Office - Supreme Court, U.S.
FILED
DEC 8 1981
ALEXANDER L. STEVAS

No. 81-679

In the Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, SILVERGATE DISTRICT LODGE 50, PETITIONER

v.

DAVID ANDERSON and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

MICHAEL CONNOLLY
General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

QUESTION PRESENTED

Whether Section 701(j) of the Civil Rights Act of 1964, 42 U.S.C. 2000e(j), which mandates reasonable accommodation of employees' religious practices, violates the Establishment Clause of the First Amendment, when applied to permit an employee, whose religious beliefs proscribe union sponsorship, to contribute to a nonreligious charity an amount equal to the union dues and fees paid by his coworkers, when his failure to pay union dues would otherwise warrant his discharge.

TABLE OF CONTENTS

Page
Opinions below ... 1
Jurisdiction ... 2
Statutory and constitutional provisions involved ... 2
Statement ... 4
Argument ... 7
Conclusion ... 24

TABLE OF AUTHORITIES

Cases:

Alexander v. *Gardner-Denver Co.,* 415 U.S. 36 ... 13
Brown v. *Pena,* 441 F. Supp. 1382, aff'd without opinion, 589 F.2d 1113 ... 23
Burns v. *Southern Pacific Transportation Co.,* 589 F.2d 403, cert. denied, 439 U.S. 1072 ... 7
Committee for Public Education v. *Nyquist,* 413 U.S. 756 ... 7, 15, 19
Cooper v. *General Dynamics, Convair Aerospace Division,* 533 F.2d 163, cert. denied, 433 U.S. 908 ... 8, 9
Dawson v. *Mizell,* 325 F. Supp. 511 ... 23
Dewey v. *Reynolds Metals Co.,* 429 F.2d 324 ... 23
Emporium Capwell Co. v. *Community Organization,* 420 U.S. 50 ... 13
Founding Church of Scientology v. *United States,* 409 F.2d 1146, cert. denied, 396 U.S. 963 ... 21
Gavin v. *Peoples Natural Gas Co.,* 464 F. Supp. 622, vacated and remanded on other grounds, 613 F.2d 482 ... 23
Gillette v. *United States,* 401 U.S. 437 ... 18, 19, 22
Griggs v. *Duke Power Co.,* 401 U.S. 424 ... 16, 18
Hecht v. *Malley,* 265 U.S. 144 ... 20
Jackson v. *Veri Fresh Poultry, Inc.,* 304 F. Supp. 1276 ... 23
Kettell v. *Johnson & Johnson,* 337 F. Supp. 892 ... 23

Cases—Continued **Page**

Lemon v. *Kurtzman*, 403 U.S. 602 21
Malnak v. *Yogi*, 592 F.2d 197 21
McDaniel v. *Essex International, Inc.*, 571 F.2d 338 .... 7-8, 9, 13
New York v. *Cathedral Academy*, 434 U.S. 125 21
NLRB v. *Catholic Bishop of Chicago*, 440 U.S. 490 21
Nottelson v. *Smith Steel Workers, D.A.L.U. 19806*, 643 F.2d 445, cert. denied, Nos. 81-97 & 81-323 (Nov. 9, 1981) 7, 8
Occidental Life Insurance Co. v. *EEOC*, 432 U.S. 355 10
Phillips Co. v. *Walling*, 324 U.S. 490 10
Rankins v. *Commission on Professional Competence*, 24 Cal. 3d 167, 593 P.2d 852, 154 Cal. Rptr. 907, appeal dismissed for want of a substantial federal question, 444 U.S. 986 .... 7, 8
Redmond v. *GAF Corp.*, 574 F.2d 897 9
Reid v. *Memphis Publishing Co.*, 468 F.2d 346 23
Retail Clerks v. *Schermerhorn*, 373 U.S. 746 14
Riley v. *Bendix Corp.*, 464 F.2d 1113 23
Theriault v. *Carlson*, 495 F.2d 390 21
Tilton v. *Richardson*, 403 U.S. 672 19
Tooley v. *Martin-Marietta Corp.*, 648 F.2d 1239 .... *passim*
Trans World Airlines, Inc. v. *Hardison*, 432 U.S. 63 .... 14, 15
United States v. *Kuch*, 288 F. Supp. 439 21
United States v. *Rutherford*, 442 U.S. 544 10
United States v. *Seeger*, 380 U.S. 163 .... 20, 21, 22
Walz v. *Tax Commission*, 397 U.S. 664 .... 19, 22
Welsh v. *United States*, 398 U.S. 333 .... 20, 21, 22
Wisconsin v. *Yoder*, 406 U.S. 205 19
Zorach v. *Clauson*, 343 U.S. 306 18

Constitution, statutes and regulations:

United States Constitution:
  First Amendment 3, 19
    Establishment Clause 6, 19, 20, 21
    Free Exercise Clause 21

Constitution, statutes and regulations—Continued — Page

- Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq.* 4
  - Section 701(j), 42 U.S.C. 2000e(j) *passim*
  - Section 703(a), 42 U.S.C. 2000e-2(a) 2, 4, 9, 15, 20
  - Section 703(c), 42 U.S.C. 2000e-2(c) 3, 4, 15
  - Section 703(c)(1), 42 U.S.C. 2000e-2(c)(1) 9
  - Section 703(c)(2), 42 U.S.C. 2000e-2(c)(2) 9
  - Section 703(c)(3), 42 U.S.C. 2000e-2(c)(3) 9
  - Section 703(h), 42 U.S.C. 2000e-2(h) 14
- Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, Section 701(j), 86 Stat. 103 16
- National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
  - Section 2, 29 U.S.C. (& Supp. III) 152 12
  - Section 8(a)(3), 29 U.S.C. 158(a)(3) 5
  - Section 14(b), 29 U.S.C. 164(b) 14
  - Section 19, 29 U.S.C. 169 8, 14
- Pub. L. No. 96-593, Section 19, 94 Stat. 3452 8, 11, 12
- 29 C.F.R. 1605.1(a) 16-17
- 29 C.F.R. 1605.1(d) 17
- 29 C.F.R. 1605.1(b) (1967) 10

Miscellaneous:

- Commission Decision No. 71-779 (1970), [1973] EEOC Dec. (CCH) ¶ 6180 21
- Commission Decision No. 71-2620 (1971), [1973] EEOC Dec. (CCH) ¶ 6283 21
- Commission Decision No. 72-1301 (1972), [1973] EEOC Dec. (CCH) ¶ 6338 20-21
- Commission Decision No. 76-104 (1976), 2 Empl. Prac. Guide (CCH) ¶ 6500 20
- 118 Cong. Rec. (1972):
  - p. 705 16, 17
  - p. 706 17
- 126 Cong. Rec. (daily ed. Feb. 11, 1980):
  - p. H760 12
  - p. H763 12-13
  - p. H764 13
- 126 Cong. Rec. S16616 (daily ed. Dec. 13, 1980) 21

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-679

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, SILVERGATE DISTRICT LODGE 50, PETITIONER

v.

DAVID ANDERSON and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-3) is reported at 648 F.2d 1247. The district court's opinion (Pet. App. B-2 to B-18) is reported at 489 F. Supp. 782. An earlier opinion of the court of appeals (Pet. App. D-1 to D-9) is reported at 589 F.2d 397, and an earlier opinion of the district court, which is reproduced in part in the appendix (Pet. App. E-1 to E-7), is reported at 430 F. Supp. 418.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1981. On September 10, 1981, Justice Rehnquist extended the time for filing the petition for a writ of certiorari to and including October 9, 1981, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 701(j) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(j), provides:

> The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's, religious observance or practice without undue hardship on the conduct of the employer's business.

Section 703(a) of Title VII, 42 U.S.C. 2000e-2(a), provides:

> It shall be unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment op-

> portunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(c) of Title VII, 42 U.S.C. 2000e-2(c), provides:

> It shall be unlawful employment practice for a labor organization—
>
> > (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
> >
> > (2) to limit, segregate, or classify its membership, or applicants for membership, or to classify or fail to refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

STATEMENT

1. On October 3, 1975, David Anderson brought this employment discrimination action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, in the United States District Court for the Southern District of California. He alleged that his employer, General Dynamics Convair Aerospace Division, and International Association of Machinists and Aerospace Workers, Silvergate District Lodge 50 ("the union"), which is the bargaining agent at his workplace, discriminated against him because of his religion, in violation of Sections 701(j) and 703(a) and (c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(j), 2000e-2(a), (c), by discharging him simply because he declined, based on religious principles, to pay union dues (Pet. Apps. D-1, E-2).

Anderson, who had worked for General Dynamics for about 16 years prior to his discharge in June 1972, is a long-standing member of the Seventh-Day Adventist Church, and his sincerely held religious beliefs prevent him from supporting unions (Pet. App. E-2 to E-3). Prior to 1972, the collective bargaining agreement between the company and the union did not contain a union security clause (*id.* at E-2). In April 1972, however, the company and the union negotiated a collective bargaining agreement that contained a union security clause requiring union membership as a condition of employment (*ibid.*). Anderson informed the company and the union that he objected on religious grounds to the payment of union dues, and he offered to contribute to a recognized charity an amount equal to the union dues that he would otherwise be required to pay (*id.* at D-2 to D-3). He also indicated that he would not pay the equivalent sum to the union because he would not trust the union to forward the monies to charity (*ibid.*; *id.* at E-7).[1] The company and the union refused Anderson's suggested accommodation and he was discharged in June 1972 (*id.* at D-3).

2. The district court held, in a decision rendered after a trial, that the requested accommodation imposed an undue hardship on the union, and judgment for the defendants was entered on February 17, 1977 (Pet. Apps. D-2, E-8). The court of appeals reversed and remanded on September 7, 1978 (*id.* at D-1 to D-9). The court of appeals first held (*id.* at D-5) that unless undue hardship is shown, Section 701(j) of Title VII, 42 U.S.C. 2000e(j), requires reasonable accommodation of an employee's religious objections to union dues that he would otherwise be required to pay because of a union security agreement authorized by Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3). The court further held that neither the union nor the employer had attempted to accommodate Anderson, and the court rejected their argument that the requested accommodation fostered "free riders" and was therefore an undue hardship as a matter of law (Pet. App. D-7 to D-9). Because the district court had not reached the merits of the defendants' constitutional argument, the court of appeals declined to do so, although the defendants had "renew[ed] that attack, at least obliquely, on appeal" (*id.* at D-9 n.5). On June 4, 1979,

---

[1] Petitioner's assertion (Pet. 5, 6) that Anderson simply refused to pay the equivalent of dues to a nonreligious charity is contrary to the record evidence. See pages 22-23, note 23, *infra*.

this Court denied the union's petition for a writ of certiorari (*id.* at C-1).[2]

3. On remand to the district court, the employer and the union renewed their constitutional defense and moved for summary judgment on the ground that Section 701(j) violates the Establishment Clause of the First Amendment. On May 2, 1980, the district court granted summary judgment, holding that Section 701(j) was unconstitutional (Pet. App. B-2 to B-18).[3]

On June 23, 1981, the court of appeals reversed (Pet. App. A-1 to A-3) for the reasons stated in *Tooley* v. *Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981), petition for cert. pending, No. 81-572, which had been argued in tandem with this case, and which had been decided on June 22, 1981.[4] In *Tooley* v. *Martin-Marietta Corp.*, *supra*, the court upheld the constitutionality of Section 701(j), as applied to require a "charity substitution" accommodation for employees who object on religious grounds to the payment of union dues, absent a showing of undue hardship. The court of appeals reached this conclusion based on the three-part test articulated by this Court in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 772-773 (1973). The court concluded that: (1) the statute had a secular purpose—"to promote Title VII's broader policy of prohibiting discrimination in employment"; (2) the primary effect of the charity substitution accommodation is not to advance religion but merely to "allow[] the plaintiffs to work without violating their religious beliefs, at a cost equivalent to that paid by their co-workers without similar beliefs"; and (3) the implementation of the accommodation does not require the government to become impermissibly entangled with religion (648 F.2d at 1245-1246).[5]

---

[2] Anderson informed the court of appeals (Br. 5) that he was reinstated following this Court's denial of the union's petition for a writ of certiorari, and he continued to be employed until May 1980, when the district court decided the case on remand; he donated an amount equal to union dues to the American Cancer Society during this period.

[3] The Equal Employment Opportunity Commission filed a brief amicus curiae in the district court on remand. On June 10, 1980, the Commission was granted leave to intervene in the court of appeals.

[4] The opinion of the court of appeals in *Tooley* v. *Martin-Marietta Corp.*, *supra*, is reproduced in petitioner's appendix (Pet. App. F-1 to F-12).

ARGUMENT

Every court of appeals that has addressed the question has held that Section 701(j) of Title VII, 42 U.S.C. 2000e(j), requires that unions and employers exempt employees who object, on religious grounds, to the payment of union dues, unless such an accommodation would constitute undue hardship.[6]

---

[5] The court also held (648 F.2d at 1244 n.8) that the constitutionality of Section 701(j), as applied in these cases, was not governed by *Rankins* v. *Commission on Professional Competence*, 24 Cal. 3d 167, 593 P.2d 852, 154 Cal. Rptr. 907, appeal dismissed for want of a substantial federal question, 444 U.S. 986 (1979), because "this case and *Rankins* involve entirely different kinds of religious accommodations, [and] the constitutional dimension of each is necessarily different."

[6] See *Tooley* v. *Martin-Marietta Corp., supra*, 648 F.2d at 1244-1246; *Burns* v. *Southern Pacific Transportation Co.*, 589 F.2d 403, 405 (9th Cir. 1978), cert. denied, 439 U.S. 1072 (1979); *Nottelson* v. *Smith Steel Workers, D.A.L.U. 19806*, 643 F.2d 445, 450-451 (7th Cir. 1981), cert. denied, Nos. 81-97 & 81-323 (Nov. 9, 1981); *McDaniel* v. *Essex International*,

Not only is there no conflict among the circuits,[7] but the issue lacks prospective importance because in December 1980, Congress amended Section 19 of the National Labor Relations Act, 29 U.S.C. 169 (Pub. L. No. 96-593, 94 Stat. 3452), to create a significantly broader exemption for persons who object on religious grounds to the payment of union dues, and thereby readjusted the relationship between the provisions of Title VII and the National Labor Relations Act. Further review is therefore unwarranted at the present time.

Inc., 571 F.2d 338 (6th Cir. 1978); *Cooper* v. *General Dynamics, Convair Aerospace Division*, 533 F.2d 163, 169-170 (5th Cir. 1976), cert. denied, 433 U.S. 908 (1977).

Both the constitutional and the statutory questions that petitioner seeks to raise here are identical to those that the Court recently declined to review in *Nottelson* v. *Smith Steel Workers, D.A.L.U. 19806, supra.* We also note that petitioner here contends that the charitable contribution substitute for union dues constitutes "undue hardship" as a matter of law, and petitioner has not therefore made any factual record to show such hardship as a matter of fact.

[7] There is also no merit to petitioner's additional contention (Pet. 26-27) that review by this Court is warranted to resolve an intercircuit conflict concerning the effect to be given this Court's dismissal of an appeal, for want of a substantial federal question, in *Rankins* v. *Commission on Professional Competence, supra.* The court below concluded in *Tooley* v. *Martin-Marietta Corp., supra*, 648 F.2d at 1244 n.8, that this Court's dismissal of the appeal in *Rankins* did not constitute a definitive holding that Section 701(j) is constitutional, but then proceeded to uphold the constitutionality of this section based on an independent analysis of the issue. In *Nottelson* v. *Smith Steel Workers, D.A.L.U. 19806, supra*, 643 F.2d at 453, the Seventh Circuit stated that it was "inclined" to believe that *Rankins* controlled, but proceeded to analyze anew the constitutionality of Section 701(j), which it then upheld. In these circumstances, there is no conflict between the circuits warranting review by this Court.

1. a. As the court of appeals correctly held, Section 701(j) requires that employers and unions[8] accommodate "*all aspects* of [employee] religious observance and practice" (Section 701(j) of Title VII, 42 U.S.C. 2000e(j); emphasis added). The plain language of the statute indicates "that it applies to all religious observances and practices and is not limited to claims of discrimination based on requirements of Sabbath work." *McDaniel* v. *Essex International, Inc.*, *supra*, 571 F.2d at 342; *Cooper* v. *General Dynamics, Convair Aerospace Division*, *supra*, 533 F.2d at 168. Cf. *Redmond* v. *GAF Corp.*, 574 F.2d 897, 900 (7th Cir. 1978) ("we note that the very words of the statute * * * leave little room for * * * a limited interpretation").[9] Because the

---

[8] Although Section 701(j) does not specifically refer to *union* accommodation of employee religious practices, the union's obligation is based on Section 703(c)(1) of Title VII, 42 U.S.C. 2000e-2(c)(1) (a labor organization may not "exclude or * * * expel from its membership, or otherwise * * * discriminate against, any individual because of * * * religion * * *"); on Section 703(c)(2) of Title VII, 42 U.S.C. 2000e-2(c)(2) (a labor organization may not "limit, segregate, or classify its membership * * * in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's * * * religion * * *"); and on Section 703(c)(3) of Title VII, 42 U.S.C. 2000e-2(c)(3) (a labor organization may not "cause or attempt to cause an employer to discriminate against an individual in violation of this section").

[9] Petitioner relies (Pet. 11) on a statement made in the Commission's Sixth Annual Report, which was published on March 30, 1972, to show that the Commission did not then construe Section 703(a) of Title VII, the statute's basic prohibition of religious discrimination, to make illegal the dis-

legislative history of Section 701(j) is devoid of "firm evidence [to show] that the [section] cannot mean what it so clearly seems to say" (*Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 361 (1977)), there is no good ground for contending that the equal employment opportunity guaranteed by Section 701(j) to all religious practitioners should somehow be limited.[10]

b. Petitioner seeks to avoid the broad sweep of Section 701(j) by arguing (Pet. 11-12) that Congress' consideration of legislation to amend the National Labor Relations Act, with respect to the pay-

---

charge of a person whose religious convictions proscribed payment of union dues. However, the statement upon which petitioner relies merely described a Commission determination that occurred in 1971, before the enactment of Section 701(j). We also note that this 1971 Commission determination was not contemporaneously reported by the unofficial reporting services, and the Commission does not believe that the determination was generally available until the publication of the Sixth Annual Report, which occurred several days after Congress enacted Section 701(j). Although the Commission had previously promulgated a guideline (29 C.F.R. 1605.1(b) (1967)) similar to Section 701(j), the Commission did not believe that its guidelines could create an exception to the National Labor Relations Act. However, such an exception was expressly created by Congress in 1972, when it enacted Section 701(j).

[10] Cf. *Phillips Co.* v. *Walling*, 324 U.S. 490, 493 (1945) (exemptions from humanitarian and remedial legislation must be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress); *United States* v. *Rutherford*, 442 U.S. 544, 552 (1979) (exceptions to clearly delineated statutes will be implied only where essential to prevent "absurd results" or consequences obviously at variance with the policy of the enactment as a whole).

ment of union dues by religious objectors, shows that Congress did not intend Section 701(j) to apply in this area.[11] This argument was made more fully by petitioner in *Tooley*, who attempted to demonstrate Congress' intent in enacting Section 701(j) by canvassing (see 81-572 Pet. 14-16) the legislative history of these proposed amendments to the NLRA. That legislative history is singularly unhelpful, however, because it neither contains any reference to Section 701(j) nor provides any explanation for this omission. Moreover, the post-enactment "legislative history" upon which the petitioner in *Tooley* relies is incomplete at best because it ignores the legislative history of the December 1980 amendments to Section 19 of the NLRA.[12] As the court below stated in *Tooley*, the sponsors of that amendment, who cited with approval the relevant prior decisions of the courts of appeals, clearly indicated their understanding that Section 701(j) of Title VII also provides protection to union dues objectors (648 F.2d at 1242 & nn.3, 4).[13] Thus, in Congress' view, Sec-

---

[11] Among other things, this argument ignores the differences in scope between Section 701(j) and the proposed NLRA amendments. For instance, unlike Section 701(j), the proposed NLRA amendments (see 81-572 Pet. 16-17 & n.11), including those enacted in 1974 and 1980, did not contain an undue hardship defense, and thus required exemption for religious objectors regardless of the resulting hardship to the union. Congressional action or inaction with respect to these significantly different bills is therefore irrelevant to the meaning of Section 701(j).

[12] Congress amended Section 19 of the NLRA on December 24, 1980 (see Pub. L. No. 96-593, 94 Stat. 3452) to provide a broad exemption from the payment of union dues or fees for employees belonging to a "bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations." The amendment provides that such objectors may be required by a bargaining agreement to contribute a sum equal to union dues and fees to a nonreligious charity and also to pay costs incurred by unions in pursuing grievance—arbitration procedures where these are undertaken at the objector's request.

The fact that the two sections are different hardly supports the union's contention (Pet. 12) that the "effect [of the 1980

---

amendment to the NLRA] is not curative but instead invites constitutional challenges and leaves clouded the legitimacy of the NLRA amendment." Indeed, if petitioner were correct in its view that the two provisions are inherently antagonistic, one would expect that Congress would have disavowed, rather than confirmed, the applicability of Section 701(j) to union dues cases. In fact, the alleged differences—except for the different enforcement mechanisms and the absence of an undue hardship defense under the NLRA—appear to be inconsequential as a practical matter. Moreover, it is reasonable to expect (because of the absence of an undue hardship defense in Section 19 of the NLRA) that most union dues objectors will in the future invoke the protection of the NLRA rather than Title VII, assuming that both statutes are applicable. But see Section 2 of the NLRA, 29 U.S.C. (& Supp. III) 152. At the present time, of course, the full meaning of Section 19 of the NLRA remains untested by litigation. If difficulties should arise in the future in harmonizing these two statutes, the Court may then wish to consider the question, but such consideration now would be premature.

[13] See 126 Cong. Rec. S16616 (daily ed. Dec. 13, 1980) (remarks of Senator Melcher); 126 Cong. Rec. H760 (daily ed. Feb. 11, 1980) (remarks of Rep. Thompson: "[T]he bill would make the National Labor Relations Act consistent with section 701(j)" and the "option of allowing a qualifying individual the right to pay the equivalent of [union] dues to a nonreligious charity clearly constitutes a 'reasonable accommodation' to the individual's religious benefits."); *ibid.* (remarks of Rep. Hinson: The "legislation reflects an accommodation among constitutional principles; the basic rights protected in Title VII * * * [and] the rights created by the National Labor Relations Act * * *."); *id.* at H763 (remarks

tion 701(j) complements Section 19 of the NLRA as a means of accommodating persons whose religious convictions against union sponsorship would needlessly deprive them of their jobs.

c. Finally, the court of appeals' holding that Section 701(j) affords some protection to employees who object on religious grounds to the payment of union dues is, contrary to petitioner's contention (Pet. 7-10, 13-15), fully consistent with the well-established principles that our "national labor policy embodies the principles of nondiscrimination as a matter of highest priority." *Emporium Capwell Co.* v. *Community Organization*, 420 U.S. 50, 66 (1975); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). See *McDaniel* v. *Essex International, Inc.*, *supra*, 571 F.2d at 343; Pet. App. D-5. Petitioner stands this principle on its head by contending that Congress' general (and earlier) authorization of union security arrangements in the NLRA shows that Congress did not intend, despite the broad language used in Section 701(j), to allow even minor modifications of such arrangements when they discriminate against individuals whose deeply-held religious beliefs prevent them from paying union dues.

---

of Rep. Clausen: "[T]he purpose of this bill is to resolve any conflict and to express congressional intent as to the reasonableness of a charity substitution accommodation which all of the Federal courts of appeals ruling on the issue have found to be an accommodation acceptable under Title VII."); *ibid.* (remarks of Rep. Duncan: "The conscience amendment reconciles * * * the National Labor Relations Act and the * * * reasonable accommodation section, 43 U.S.C. 2000e(j) [*sic*]."); *id.* at H764 (remarks of Rep. Erlenborn: "[T]his bill accepts the principles of religious liberty as guaranteed by our Constitution and implemented by the Equal Employment Opportunity Act.").

To the contrary, the modifications permitted under Section 701(j) are the most limited of several exceptions that Congress has created with respect to union security agreements.[14] Section 701(j) is therefore consistent with Congress' general view that the overall policy in favor of union security agreements is subject to modification when it conflicts with other important public policy considerations.

Moreover, contrary to the union's contention (Pet. 7-12), its argument is not supported by *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), in which this Court held only that "[w]ithout a clear and express indication from Congress, we cannot agree * * * that an agreed-upon *seniority system* must give way when necessary to accommodate religious observances" (*id.* at 79; emphasis added). In Section 703(h) of Title VII, 42 U.S.C 2000e-2(h), Congress accorded special status to bona fide seniority systems and, for that reason, Section 701(j) could not invalidate a bona fide seniority system "even if the system has some discriminatory consequences" (432 U.S. at 82). However, Title VII contains no such exception relating to bona fide *union security* arrangements, and Section 701(j)'s mandate of reasonable accommodation of "all aspects of religious observance" must therefore extend to religious objections to dues payments.[15]

---

[14] For instance, under Section 14(b) of the NLRA, 29 U.S.C. 164(b), such agreements are unenforceable in states with laws prohibiting them. See *Retail Clerks* v. *Schermerhorn*, 373 U.S. 746 (1963). Similarly, prior to its amendment in December 1980, Section 19 of the NLRA, 29 U.S.C. 169, provided that employees of health care institutions with religious objections to the payment of union dues had an absolute right to contribute the equivalent of dues to charity, regardless of whether undue hardship resulted. The December 1980 amendment has extended that right to all employees, provided that they pay the cost of any grievance-arbitration procedures that they might invoke.

2. The court of appeals correctly held that Section 701(j), as applied here, passed muster under the test articulated by this Court in *Committee for Public Education* v. *Nyquist*, *supra*, 413 U.S. at 772-773, because it has both a secular purpose and a primary effect that neither advances nor inhibits religion, and because its administration does not excessively entangle government in religion.[16]

---

[15] To the extent that *Hardison* may be construed as requiring a "'clear and express indication from Congress'" that any accommodation which impacts on national labor policy is "reasonable", the court below in *Tooley* correctly recognized (648 F.2d at 1243 n.5) such an indication in the December 1980 NLRA amendment, which prescribes the charity substitution as an accommodation for persons whose religious convictions prevent compliance with union security agreements.

[16] There is no merit to petitioner's contention (Pet. 9-10) that the court of appeals erred in holding that *Tooley* v. *Martin-Marietta Corp.*, *supra*, was controlling here. Petitioner seeks to distinguish the two cases on the ground that this case was brought only under Section 701(j), and not also under Sections 703(a) and (c), as was the case in *Tooley*. As a matter of fact, Anderson's allegations were not so construed by the courts below. See Pet. Apps. D-1, E-4 to E-5. At all events, Section 701(j) is simply a definitional section giving specific content to the substantive prohibitions of religion-based discrimination that are contained in Sections 703(a) and (c). Thus, this case necessarily involved Sections 703(a) and (c), as did *Tooley*. As in *Tooley*, however, the constitutional attack necessarily was focused on Section 701(j).

a. The reasonable accommodation requirement of Section 701(j) serves the same clearly secular legislative purpose that is generally served by Title VII because Section 701(j) does no more than define "religion" in a manner that is reasonably calculated to ensure that employment practices "fair in form, but discriminatory in operation" (*Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971)) are effectively covered by the basic prohibition of the Act. The legislative history of Section 701(j), which was added to Title VII by Senate floor amendment to the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, clearly demonstrates this secular purpose. As stated by Senator Randolph, the proponent of the amendment, it was intended to further Title VII's guarantee of "freedom from religious discrimination in the employment of workers" (118 Cong. Rec. 705 (1972)). Petitioner's contention (Pet. 18) that "no legitimate secular purpose for the legislation was expressed or intimated" by Congress is therefore without merit, and petitioner's argument (*id.* at 19-20) that Senator Randolph's remarks prove that the purpose of this provision is merely to satisfy the needs of Sabbatarians, is untenable in light of the statutory language, the Commission guideline from which Section 701(j) was developed, and the congressional debate that accompanied the enactment of this provision.

In terms, Section 701(j) broadly encompasses "all aspects of religious observance and practice," and the Commission guideline from which this section was derived was itself prompted by the filing of charges with the Commission by "employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays" (29 C.F.R. 1605.1(a)). Moreover, the guideline was specifically made applicable to "the variety of situations which arise due to the varied religious practices of the American people" (id. at 1605.1(d)). It is true, of course, that Senator Randolph's remarks evinced special concern for the dwindling membership of some Sabbatarian sects, but the overriding theme of his observations was that the amendment was needed to eliminate "religious discrimination in * * * employment" (118 Cong. Rec. 705 (1972)). Thus, Senator Randolph agreed with Senator Dominick that the provision would protect equal employment opportunities, not only with respect to Sabbatarians, but also with respect to the members of any "other religious sect which has a different method of conducting their lives than do most Americans" (*id.* at 705-706). The purpose of the amendment was not to advance religion but, rather, in "the spirit of religious freedom" (*id.* at 706), to ensure that no individual's religious practices would needlessly restrict his employment opportunities by compelling him to choose between his job and his conscience, whenever that result could be accomplished without causing "undue hardship" to others. A fair reading of the legislative debate therefore shows that Senator Randolph referred to the problems of Sabbatarian sects merely as a particular and graphic example of the need for general legislation to prevent unnecessary discrimination on the basis of religious observance.

b. The primary effect of Section 701(j) is the same as its secular purpose: to preserve the equal employment opportunities of individuals whose religious beliefs and practices, while conflicting with general employment rules, may be accommodated without undue hardship. The primary effect of Section 701(j) neither advances nor inhibits religion but simply removes artificial and unnecessary barriers to employment by ensuring that a person's religion and religious practices remain "irrelevant" (*Griggs* v. *Duke Power Co., supra,* 401 U.S. at 436) in connection with job opportunities, except to the extent that they materially affect an individual's ability to perform his job. As the court of appeals stated in *Tooley,* Section 701(j), as applied to require the "charity substitution" accommodation for religious objectors to union dues, "allows the plaintiffs to work without violating their religious beliefs at a cost equivalent to that paid by their co-workers without similar beliefs" (648 F.2d at 1246). Thus, "[i]t neither increases nor decreases the advantages of membership in the Seventh-Day Adventist faith in a manner so substantial and direct that it 'advances' or 'inhibits' the plaintiffs' religion" (*ibid.*).

There is no merit to petitioner's contention (Pet. 20-21) that the "primary effect" of Section 701(j) is to advance, prefer, or discriminate in favor of religion over non-religion, or to prefer particular sects whose practices require accommodation over those whose practices do not. Petitioner fails to recognize that all religious accommodations, including those previously upheld by this Court, may be said to aid or benefit religious practice or groups in some sense. See, *e.g.*, *Gillette* v. *United States,* 401 U.S. 437, 462 (1971) (upholding exemption for religious conscientious objectors to service in the armed services); *Zorach* v. *Clauson,* 343 U.S. 306 (1952) (upholding release of students from public schools to attend religious centers for religious instruction or devotional exercises).[17] Indeed, virtually any provision designed to give religious belief and practice breathing space in which to survive may be said to "aid" religious activity. However, as this Court has said, "[t]he crucial question is not whether some benefit accrues to a religious institution as a consequence of the [legislation], but whether its principal or primary effect advances religion." *Tilton* v. *Richardson*, 403 U.S. 672, 679 (1971).

Section 701(j) does no more than extend equal employment opportunity protection to a class of individuals whose religious observances might otherwise needlessly cost them their jobs. This Court has recognized that there is a constitutional difference between the active support of "direct and substantial advancement" (*Committee for Public Education* v. *Nyquist*, *supra*, 413 U.S. at 785 n.39) prohibited by the Establishment Clause, and the "indirect" or "remote" (*id.* at 784 n.39) effect of essentially defensive protection such as that afforded by Section 701(j). See *Wisconsin* v. *Yoder*, 406 U.S. 205, 234-235 n.22 (1972). This case, of course, does not involve diversion of union funds to religious institutions or financial support of religious activity of any sort. Under the accommodation required by the court of appeals' decision, Anderson would be required to pay the same amount of "dues" as his union co-workers. Other employees will not be encouraged to take the same course, therefore, unless they truly hold similar religious beliefs. Moreover, the alternative to this accommodation—approving the discharge of Anderson from his employment—is contrary to the fundamental policy of Title VII in that such a discharge would be based solely upon his adherence to his religious beliefs and, obviously, would be totally unrelated to his ability to do his job.

---

[17] Such legislation has been upheld despite its indirect or incidental burden on non-accommodated parties. For example, when conscientious objectors are exempted from service in the armed forces, others necessarily will be required to serve in their stead. *Gillette* v. *United States*, *supra*, 401 U.S. at 448-450. Similarly, churches may be exempted from property taxes, thus presumably increasing the amount that other property owners must pay. *Walz* v. *Tax Commission*, 397 U.S. 664 (1970). The minor adjustments required in this case, permitting the diversion of union dues to a charitable organization for a person whose religion forbids contributions to unions, are certainly no more significant than those that have previously been upheld under the First Amendment.

Finally, we note that there is no basis for petitioner's contention (Pet. 22, 24-25) that the broad class of persons protected by Section 701(j) is limited to "members of a particular religious faith." Section 701(j), like similar provisions of the selective service laws, is designed to afford relief to those who cannot comply with facially non-discriminatory requirements because of transcendent beliefs that are held with the strength of traditional religious convictions. See *Welsh* v. *United States*, 398 U.S. 333, 342-344 (1970) (plurality opinion); see also *id.* at 358 & n.10 (Harlan, J., concurring).[18] Section 701(j) is therefore wholly consistent with the Establishment Clause.

---

[18] That Congress intended to give broad effect to the term "religious" may be inferred from the fact that Section 701(j) was enacted after this Court had decided *United States* v. *Seeger*, 380 U.S. 163 (1965). See *Hecht* v. *Malley*, 265 U.S. 144, 153 (1924). The Commission has consistently interpreted the term "religious" in Sections 703(a) and 701(j) (as well as in the Commission guideline from which Section 701(j) was derived), to have the same breadth as it does under the selective service laws. See Commission Decision No. 76-104 (1976), 2 Empl. Prac. Guide (CCH) ¶ 6500; Com-

c. The court of appeals also properly rejected the view that Section 701(j), as applied here, entails excessive government entanglement with religion. The entanglement doctrine has been invoked only where legislation requires that the government intrude excessively into the affairs of religious institutions. See *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *New York* v. *Cathedral Academy*, 434 U.S. 125 (1977); see also *Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971). Government intrusion has been held "excessive" where it entails pervasive monitoring of such institutions by secular authorities and, therefore, carries the threat of government direction and control of religion—precisely the evil at which the Establishment Clause is aimed. See *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 616-620; *NLRB* v. *Catholic Bishop of Chicago*, *supra*, 440 U.S. at 503. However, a court's determination of the religious nature and sincerity of a Title VII plaintiff's practices or beliefs involves no similar interference with religious institutions. See generally *Welsh* v. *United States*, *supra; United States* v. *Seeger*, 380 U.S. 163 (1965). Indeed, the enforcement of Section 701(j) creates no greater entanglement with religion than does the adjudication in general of claims arising under the Free Exercise[19] and Establishment Clauses,[20] or in cases relating to claims

---

mission Decision [1973] 72-1301 (1972), EEOC Dec. (CCH) ¶ 6338; Commission Decision No. 71-2620 (1971), [1973] EEOC Dec. (CCH) ¶ 6283; Commission Decision No. 71-779 (1970), [1973] EEOC Dec. (CCH) ¶ 6180.

[19] See, *e.g.*, *Founding Church of Scientology* v. *United States*, 409 F.2d 1146, 1156-1157 (D.C. Cir), cert. denied, 396 U.S. 963 (1969); *Theriault* v. *Carlson*, 495 F.2d 390 (5th Cir. 1974); *United States* v. *Kuch*, 288 F. Supp. 439 (D.D.C. 1968).

[20] See, *e.g.*, *Malnak* v. *Yogi*, 592 F.2d 197 (3d Cir. 1979).

to statutory tax exemptions for religious institutions[21] and conscientious objector status under the selective service laws.[22]

Thus, petitioner's reliance (Pet. 24-26), as a source of constitutional objection to the enforcement of Section 701(j), upon the alleged difficulty of determining whether a belief is "religious" and sincerely held, is clearly misplaced. At all events, the facts of this case well demonstrate the purely hypothetical nature of petitioner's concern in that the religious character and the sincerity of Anderson's beliefs were both unquestioned (Pet. App. D-5 to D-6 & n.2).[23] Indeed, sincerity of belief has not generally been an issue in Section 701(j) cases,[24] and the Commission is aware of only one instance in which the religious nature of a belief has been questioned and found lacking.[25]

---

[21] See *Walz* v. *Tax Commission, supra.*

[22] See, *e.g., Gillette* v. *United States, supra.* We note that petitioner relies (Pet. 25) on certain language in the Court's opinion in *Gillette* (401 U.S. at 456-458) which, when taken out of context, may suggest that the government should avoid involvement with difficult determinations of what is "religious." However, the context of that language shows that the Court was merely explaining the basis for Congress' refusal to extend conscientious objector status to persons who were conscientiously opposed only to particular wars. There is no suggestion that the Court perceived any constitutionally questionable entanglement to exist in applying the standards of *United States* v. *Seeger, supra,* and *Welsh* v. *United States, supra,* to that class of cases which Congress had seen fit to exempt.

[23] Petitioner incorrectly states (Pet. 25) that the district court held in its first opinion that Anderson's "religious beliefs were not the basis for his refusal to pay union dues but rather that he was motivated by a general distrust of unions." The district court merely found (Pet. Apps. E-7, D-6 to D-7) that Anderson had refused to pay the charitable contribution dues substitute to the union because he did not believe that the union would in fact forward his money to a charity. It is undisputed that Anderson desired that a sum equivalent to

---

union dues be paid to a charity because his religious convictions proscribed union sponsorship. Petitioner's argument (Pet. 28-30) that the court of appeals substituted its own factual findings for a contrary finding by the district court is based on its misapprehension of what was in fact found by the district court.

[24] See, *e.g.*, *Reid* v. *Memphis Publishing Co.*, 468 F.2d 346, 348 (6th Cir. 1972); *Riley* v. *Bendix Corp.*, 464 F.2d 1113, 1114 (5th Cir. 1972); *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, 335 (6th Cir. 1970); *Dawson* v. *Mizell*, 325 F. Supp. 511, 513 (E.D. Va. 1971); *Jackson* v. *Veri Fresh Poultry, Inc.*, 304 F. Supp. 1276, 1278 (E.D. La. 1969); *Kettell* v. *Johnson & Johnson*, 337 F. Supp. 892 (E.D. Ark. 1972).

[25] See *Brown* v. *Pena*, 441 F. Supp. 1382 (S.D. Fla. 1977), aff'd without opinion, 589 F.2d 1113 (5th Cir. 1979).

Petitioner's reliance (Pet. 24) on *Gavin* v. *Peoples Natural Gas Co.*, 464 F. Supp. 622 (W.D. Pa. 1979), vacated and remanded on other grounds, 613 F.2d 482 (3d Cir. 1980), is misplaced. The district court there erroneously predicated its discussion on the assumption that Section 701(j) protects only religious beliefs and practices that are part of a recognized creed and it therefore feared having to resolve conflicting expert testimony as to established religious tenets (464 F. Supp. at 631-632). As we have shown (see pages 20-21, *supra*), membership in an institutional religion or sect is not a necessary condition to invoking Section 701(j).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

MICHAEL CONNOLLY
General Counsel
Equal Employment Opportunity Commission

DECEMBER 1981

☆ U. S. GOVERNMENT PRINTING OFFICE; 1981 358686 716